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THE LAW OF
PAKKI & KATCHI ADAT

AND

TEJI-MANDI CONTRACTS

BY

RAMNIKLAL R. MODY, B.A., LL.B.,
SOLICITOR, HIGH COURT BOMBAY.

*Author of The Law of Shah Jog and other Hundies, Fazandari Tenures
and Inami Lands in Bombay City, Sanadi Lands, etc.*

WITH FOREWORD TO THE FIRST EDITION

BY

THE RIGHT HON'BLE THE LATE
SIR DINSHAW F. MULLA, Kt., P.C., C.I.E.

AND

WITH FOREWORD TO THE SECOND EDITION

BY

THE HON'BLE MR. JUSTICE N. P. ENGINEER.

SECOND EDITION.

N. M. TRIPATHI & Co.

Law Publishers

PRINCESS STREET,
BOMBAY

1937

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Printed by Pirojsha Cursetji at The Union Press,
Jambool Wadi (East), Kalbadevi Road, Bombay
and

Published by Ramniklal R. Mody, B.A., LL.B.,
c/o Messrs Mulgaokar Mody & Co., Solicitors, Nagarseth Building
80, Esplanade Road, Fort, Bombay.

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TO
VERED AND LATE LAMENTED FATHER
Mr. RATANLAL M. MODY,
SOLICITOR
I HUMBLY DEDICATE
THIS BOOK
IN
FILIAL PIETY
AND
WITH ALL REVERENCE
TO
COMMEMORATE HIS MEMORY.

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FOREWORD TO THE SECOND EDITION.

I am asked by Mr. Ramniklal R. Mody, B.A., L.L.B., Solicitor to write a foreword to the Second Edition of his book on the Law of Pakki & Katchi Adat Systems and Teji-Mandi Transactions, and I accede to his request with pleasure. Some of the chapters in the first edition have been recast and amplified, and some new topics have also been introduced among the latter being a chapter on the question of limitation in relation to Pakki Adat and chapters on London Stock Exchange Transactions and Teji-Mandi contracts in relation to the Bombay Cotton Contracts Act. The subject dealt with by Mr. Mody is a small but interesting branch of law. No pains have been spared in finding out and dealing analytically with all the decisions on the subject. The length of the book is in some measure due to the fact that important extracts from judgments are given verbatim in the book; this itself is an advantage to the practitioner rendering in many cases a recourse to the decisions themselves unnecessary. The subjects have been dealt with in relation to all their incidents and from every point of view. At the end of every book there is a clear and concise summary of the principles established by the various decisions. I am sure the book will be found useful by practitioners, and I wish the author success in the publication.

N. P. ENGINEER.

14th July, 1937.

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FOREWORD TO THE FIRST EDITION.

It is with pleasure that I have acceded to Mr. R. R. Mody's request to write a foreword. This compilation consists of a series of articles on the law relating to Pucca Adtyas, Kachha Adtyas and Teji-Mandi transactions. The articles appeared in the Bombay Law Journal at different periods, and they were much appreciated by practitioners in Bombay.

To a practitioner in the High Court of Bombay a thorough knowledge of the various usages of trade prevailing in the local market is absolutely essential. Mr. Mody has discussed the above subjects in the light of these usages with great lucidity and he has collected all the cases bearing on them. The points of distinction between a Pucca and a Kachha Adtya are set out on p. 66 (now 164-167). They show at a glance the essential elements of Pucci Adat and Kachhi Adat. The compilation is an accurate and exhaustive statement of the law on the subject, and I have no doubt it will prove very useful to the practitioners.

D. F. MULLA.

BOMBAY :

November 29, 1930.

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PREFACE TO THE SECOND EDITION.

The manner in which the first edition of this book has been received indicates that it is found useful not only by the profession, but by the public and that it has served its purpose. After its publication there have been numerous decisions especially on the subjects of Pakki Adat and Teji-Mandi transactions. There has been only one new case on Katchi Adat treated in the second book which does not appear in the law reports. It is a feature of this edition that the practice, prevailing on the London Stock Exchange on the analogous Put, Call and Put and Call transactions corresponding with Mandi, Teji and Teji-Mandi transactions, has been explained and incorporated. This will go a great way to explain the real nature and characteristics of the Teji, Mandi and Teji-Mandi transactions largely prevalent in India. Certain other problems arising in connection with these transactions have been dealt with here, but these have not formed the subject matter of decided cases.

The references in the footnotes given in the book are merely references to the main series of law reports such as the Government series and the Bombay Law Reporter, but the references to the same cases in the other important series have also been given in the table of cases. This will enable the reader to find out with ease any case in any series in which it is reported. To facilitate reference a subject index has also been given. This edition has been brought upto date by incorporating the decisions to the end of June 1937. The subjects have been exhaustively treated, and the whole book practically recast and rewritten and it is hoped that the book will be found useful not only by the profession but also by the public at large. Every care has been taken to avoid mistakes, but if any discrepances or errors have crept in, it is hoped they will be generously over-looked. The author begs to acknowledge his obligations to Mr. N. A. Mody advocate for going through the manuscript and making invaluable suggestions. The author also begs to acknowledge his deep obligations to various other gentlemen who have made suggestions to him and who have assisted him in the preparation of this work.

R. R. M.

Zaveri House, Hughes Road,
Bombay, No. 7.
16th, July 1937.

B

PREFACE TO THE FIRST EDITION.

The contents of this little book first appeared in the shape of articles in several issues of the Bombay Law Journal. The same have now been reprinted with the kind permission of the learned editors of the said journal.

The Law of Katchi and Pakki Adat first came up for decision before the late Mr. Justice Chandavarkar, whose judgments in the cases of *Fakirchand Latchand v. Doolub Govindji*, (1905) 7 Bombay Law Reporter 213, (a case of Katchi Adat), and in *Kanji Deoji v. Bhagwandas Narottamdas* (1905) 7 Bombay Law Reporter 57 (a case of Pakki Adat), are the starting points of the law on these two subjects.

The whole law of Katchi and Pakki Adat is the outcome of custom and the case-law has not been discussed in any other book, though it is practically well settled and prevails mainly in the City of Bombay and exclusively in this Presidency. The subjects are of practical and every day importance and it is hoped this little book will be found useful. All cases bearing on the two systems of transactions have been cited and fully discussed.

The law of Teji-Mandi contracts, though extremely important, has also not been discussed in any other book. An attempt has been made to explain the nature, characteristics and incidents of Teji-Mandi transactions, as they do not seem to have been fully explained in the several decisions bearing on the subject. x x It was until very recently believed, because of the complicated nature of the transactions that transactions in Teji-Mandi were wagers pure and simple. As a matter of fact, the former view which prevailed mainly owing to a series of decisions of Beaman J has now been definitely held to be erroneous, and it has now been held by the Appeal Court here, and approved by the Judicial Committee of the Privy Council that Teji-Mandi contracts are not only not pure and simple wagers, but further that they must be presumed to be genuine and real like the ordinary forward contracts of sale and purchase of commodities, unless and until the contrary is proved.

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BOMBAY,
December 4th, 1930.

R. R. M.

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THE LAW OF THE PAKKI ADAT SYSTEM.

BOOK I.

THE PAKKI ADAT SYSTEM—THE PAKKA ADATIA.

INTRODUCTORY.

THE Pakka and Katcha Adatias may be said to be professional brothers brought into legal existence at short intervals of time both by the decisions of Chandavarkar, J. The Pakka Adatia is slightly older, his existence in law being first recognised on the 2nd December 1904,¹ while that of the Katcha Adatia was so done about two months later on 26th January 1905². These two are noted personalities both in the commercial and legal worlds. Their existence was, however, known to the commercial world much earlier than to the legal. Though they have been known to exist for the last thirty-two years, they bear such a complex character as to defy exact definition or easy description especially the Pakka Adatia and even the best judicial minds have not yet been able to perform this difficult task.

1. *Kanji Deoji v. Bhagwandas*, 2. *Fakirchand v. Doolab*, (1905) 7
(1905) 7 Bom. L. R. 57. Bom. L. R. 213.

CHAPTER I.

WHO IS A PAKKA ADATIA ?

A PAKKA Adatia has been defined by Macleod J.¹ as "a person who enters into a contract of employment with his constituent for reward. He obtains instructions from his client what contracts to enter into but generally speaking the constituent is not concerned with the method in which his instructions are carried out." Beaman J. in the same case² defines the Pakka Adatia in the following terms: "A Pakka Adatia, a creation as a legal entity as far as I know of the Bombay High Court, is a commission agent and something more. He receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due date. His peculiar feature, and one which is, as far as I know, not shared by any other agent known to the law, is that he can allocate his principal's contracts to himself when it suits him to do so." The learned Judge also said at p. 96 of the report that "neglecting his one distinguishing characteristic he is very like an ordinary *del credere* agent. But he is that and more."

1. *Bhagwandas Parasram v. Burjorji Rattionji*, (1912) 14 Bom.

L. R. 807, 809 = 37 Bom. 347, 349.
2. (1913) 15 Bom. L. R. 85, 97.

CHAPTER II.

INCIDENTS OF THE PAKKI ADAT SYSTEM.

AFTER an exhaustive survey and critical examination of a large body of evidence of respectable witnesses of considerable commercial status and general respectability Chandavarkar J.¹ laid down the following as the incidents of the Pakki Adat system :—

(1) A Pakka Adatia can allocate any up-country constituent's order to himself, without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.

(2) A Pakka Adatia receives an order to buy or sell. Accordingly he enters into a contract with a Bombay merchant. Subsequently but before the due date the Pakka Adatia enters into a cross contract with the same merchant on his own (the Pakka Adatia's) account and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery as the case may be.

(3) In the case put above No. 2 instead of entering into the cross contract on his own account, the Pakka Adatia can enter into it on behalf of another constituent. The same result follows.

When a Pakka Adatia receives a second order from his constituent to enter into a cross contract and cover his first order against due date, the Pakka Adatia is not bound to carry out the second order in case owing to loss of credit he is unable to do so and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other Pakka Adatia."

1. *Kanji Deoji v. Bhagwandas Narotamdas*, (1905) 7 Bom. L. R. 57, 65, 71.

In the appeal¹ preferred against the decision of Chandavarkar J., Sir Lawrence Jenkins described the incidents of the Pakki Adat system in the following terms.

"The evidence then appears to me to establish the following propositions in connection with Pakki Adat dealings in circumstances such as we have in this case :—

(1) That the Pakka Adatia has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) That the up-country constituent has no indefeasible right to the contract (if any) made by the Pakka Adatia on receipt of the order, but the Pakka Adatia may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) The Pakka Adatia is under no obligation to substitute a fresh contract to meet the order of his first constituent.

1. *Bhagwandas Narotamdas v. Kanji Deoji*, (1905) 7 Bom. L. R. 611,

CHAPTER III.

THE RELATIONSHIP BETWEEN THE PAKKA ADATIA
AND HIS CONSTITUENT.

IN order fully to understand the relationship between the Pakka Adatia and his constituent, it is necessary to give a short history of the usage which came to be practised in the various markets in Bombay and the Bombay Presidency and thereafter in the other markets of India also. Having regard to the decision of Macleod C. J. in *Mandalal v. Radhakissen*¹ it was suggested in the first edition of this work that it may be taken as settled that the relationship between the Pakka Adatia and his constituent is that of principal and principal, that is, for all practical purposes of buyer and seller. After the decision of Sir Lawrence Jenkins in *Bhagvandas v. Kanji*,² it seems that there is a considerable difference of judicial and legal opinion on the subject. The earlier decisions hold that the relationship is that of principal and agent, a large majority of the later decisions hold that it is of buyer and seller. The same learned Judges have taken one view in one case and a diametrically opposite view in other cases as will be presently seen. There is a set of lawyers who agree with the older view that the relationship is that of principal and agent only. There is another set of lawyers who are strongly of opinion that the relationship is that of buyer and seller only and never that of principal and agent and that all the troubles in dealing with the question of the Pakki Adat system of transactions in the cases which have come up before the Courts have arisen on account of the fact of the failure of the courts to recognise that their relationship was that of buyer and seller only and not that of principal and agent in any circumstances. It is submitted that both these views appear to be incorrect because the relationship does not and cannot be brought within either of the two categories of sale or agency alone. The confusion

1. (1920) 22 Bom. L. R. 1018 = (1921) 45 Bom. 386. 2. (1905) 7 Bom. L. R. 611 = 30 Bom. 205.

as to the exact relationship in this connection arises because of the fact that in the various cases which have come up before the Courts only one or some of the aspects and incidents of the Pakki Adat system of transactions was and were considered and decided by them. From these particular aspects and the evidence led by the parties only on the particular points in issue, the courts have held that the relationship between the two fell within one or the other categories of sale or agency alone. It is submitted that it is difficult to bring it exclusively within the one or the other, and unless and until the Pakki Adat system of transactions as a whole is considered from every point of view, no jurist or lawyer who starts with the set object and purpose of bringing it within the category of sale or agency alone, can ever succeed, because of the fact that the relationship is neither purely and simply the one nor the other, but is a strange mixture of the two.

Under the circumstances in order to properly visualise the relationship between the Pakka Adatia and his constituent, it will be much better to point out to the reader the reasons why the relationship between the two is not merely that of buyer and seller but that of principal and agent also, that is a strange mixture of the two, after first giving him a short history as to how and why the usage came to be practised in the various markets in Bombay and the Bombay Presidency and thereafter in the other markets of India also and then taking him through the various decisions on the subject so that he may be better able to grasp and realise its true and real significance and importance.

Now with the introduction of forward business in commodities such as cotton, wheat and linseed came the Pakka Adatia and the persons who, before that time, had been concerned only with direct dealings in these commodities, dealt in forward business as well and whereas they had been only commission agents simpliciter, they then became Pakka Adatias and commission agents. In the former case, the transactions were in respect of ready goods, in which

delivery was given and taken either on the spot or immediately or soon thereafter and the payment of the price thereof was made either on the spot or soon thereafter. The agent, whether he acted for the up-country or local constituent dropped out of the transaction altogether, as soon as he established a contractual privity between his constituent and the party with whom he contracted in pursuance of his constituent's order and brought them in direct contact. His only functions were to bring about contractual privity and to give and take delivery of goods on his behalf and to take and accept payment in respect of the price of the goods from and to the constituent and the Bombay merchant and for all the services he rendered in respect of such ready transactions, he received a small payment by way of commission. The commission paid was very small indeed and for the simple reason that the agent would and could never be personally responsible for the due performance of the contracts or for the giving and taking delivery of the goods or for the payments in respect thereof, except under very special circumstances. So far then, as the question of contracts for ready goods was concerned, the Adatia or the agent served only as a conduit pipe or channel, through which, the contracting parties came into direct relationship with each other and the agent dropped out of the transaction, as soon as privity was established. With the introduction of forward business, contracts came to be made months in advance and delivery of goods in respect thereof came to be given or taken on a much later date after the contract was made and the risk attending such business was considerably large, having regard to violent fluctuations which the market might undergo during the pendency of the contracts. This risk was considerably accentuated, stimulated and hardened by the craving for speculation and sometimes wild speculation which naturally followed in the wake of forward business. It was under these circumstances that the constituent whether up-country or local sought a person he could safely look to for the due performance of the contract,

for giving and taking of delivery of goods and for due payments in respect thereof. He therefore asked the agent, through whom, he had formerly contracted business in respect of ready goods to undertake personal responsibility for the due performance of such contracts and so on, as he was afraid, that he might find himself on the due date of the performance of the contract, in a very precarious position, if the persons with whom, the agent had entered into contracts under instructions from him, were dishonest in their dealings or were not of sufficient financial stability and credit and thus would not or could not perform the contracts. The constituent, under such circumstances, sought an agent who was well known in the market as a man of substance and credit, of financial stability, of responsibility and reputation and who would undertake personal responsibility to secure the objects mentioned above, but surely no agent would be such a fool as to consent to saddle himself with heavy responsibility and risk for the carrying on of the constituent's business, under such circumstances, unless he received or was promised a substantial remuneration for his services, in lieu of the pittance, he had hitherto used to receive and unless he was given certain other rights and privileges, such as the right to demand the necessary margin from time to time, so as to cover himself against the risk of the rise and fall of the prices of commodities in the particular markets in which his constituent desired him to deal on his behalf, and his right to demand all other costs, charges and expenses properly payable by the constituent for the carrying on of such business by the agent on his behalf. Naturally the constituent found the personal guarantee and responsibility of the Pakka Adatia for the due performance of the contract much more advantageous to himself, for the reason that he had nothing whatever to do with the parties, with whom, the Pakka Adatia contracted in order to cover himself or the method or the manner in which he carried out his instructions. It was this personal guarantee and liability, for the due performance of the contract which seems to have been

responsible for clothing the Pakka Adatia with the right of appropriating the contract to himself and substituting his own contracts and the non-interference on the part of the constituent with the method or the manner in which the Pakka Adatia carried out his instructions in transacting the business. The merchant in Bombay, with whom the Pakka Adatia contracted in pursuance of his constituent's orders also found similar advantages in having the Pakka Adatia's personal liability thus guaranteed to him. Both the constituent and the Bombay merchant felt, that their business would be transacted on a sounder basis and a surer footing if it was conducted on the personal liability of the Pakka Adatia in respect of the transactions. The position just described is not without authority as the observations of Chandavarkar J. in *Kanji v. Bhagwandas*¹ in connection with the defendants contention that the custom set up by the plaintiff was such as to create a conflict between the Pakka Adatia's duty and interest and the custom even if proved was invalid on the ground that it was unreasonable and unjust, show. With regard to the defendants contention as to the conflict between the Pakka Adatia's duty and interest, the learned judge pointed out that "there were several such positions in which a man is often placed and on that account it could not be fairly said that the positions did not exist or that the courts should not recognise their existence or validity." His Lordship added that "there was nothing unreasonable or unjust in the custom alleged and that on the other hand it appeared to him to be a usage intended for the convenience of up-country constituents and had been treated uniformly, as the evidence showed, as tending to the convenience and benefit of all parties concerned, that no one had until then complained of it and that but for it up-country constituents would be at a serious disadvantage in having to deal with Bombay merchants whom they do not know and whose names and contracts they never care to inquire about." These observations of the learned judge are equally

1. (1905) 7 Bom. L. R. 57, 69, 70.

applicable to the converse case of the Bombay merchants who do not know the up-country constituent and his position, reputation and substance.

The Pakka Adatia was thus brought into existence, so to say, by the ingenuity of the Indian law-merchant and by the exigencies of commerce and commercial convenience with the sole idea of fixing liability on some responsible and substantial party and stabilising business. The manner of doing business, as pointed out above, seems to have found favour in commercial circles, who engrafted the rights and duties of the constituent, the Pakka Adatia and the Bombay merchant, with the sanctity of a custom, a custom which had been prevalent and well known in the commercial world for nearly a quarter of a century, before it came up for decision and judicial sanction in *Kanji v. Bhagwandas*¹ before Chandaverkar J., as will be seen from the evidence recorded in the case. The learned Judge summing up the evidence in the case observed :

“The effect of the evidence of these witnesses may be described as follows :—

Up-country constituents, being unacquainted with Bombay shroffs or merchants, do not deal with the latter but deal with well-known Bombay firms, who on that account are known as Pakka Adatias. It is to these firms that the up-country constituents look for the fulfilment of their contracts : so do the Bombay merchants look to them alone for the fulfilment of theirs. When an up-country constituent sends an order to a Pakka Adatia to sell or buy for forward delivery, the Pakka Adatia can either appropriate or allocate the order to himself or enter into a contract with a Bombay merchant in pursuance of the order. In either case, the constituent looks to the Pakka Adatia alone and regards his order as a contract with him as if he (the Pakka Adatia) were, so far as the constituent is concerned, the principal. Where the Pakka Adatia, instead of allocating the order to himself enters into a contract with a Bombay merchant, the constituent

1. (1905) 7 Bom. L. R 57, 64-65.

never enquires who the merchant is and the Pakka Adatia never gives the name of the merchant to the constituent. The reason is that the constituent and the merchant have nothing to do with each other : each regards his transaction as one with the Pakka Adatia as the principal responsible to him. As an incident of this relationship, the Pakka Adatia is entitled in such a case to enter into a cross-contract before the due date with the same merchant either on his own account or in pursuance of an order from another constituent. In neither case is the Pakka Adatia bound to substitute another contract for the first contract entered into by him in fulfilment of the order of the original constituent : and in either case the Pakka Adatia is entitled, without any such substitution, to call upon the constituent, when the due date arrives to give delivery, if the order was to sell, or to take delivery, if the order was to buy, and to pay or receive differences as the case may be." The observations of Jenkins C. J. on appeal¹ in this respect are to the same effect. His Lordship said in this connection :

"There are points on which the evidence leaves no doubt ; thus it is clear that the contract between the plaintiffs and the defendant was on Pakki Adat terms ; then, again, it is amply proved that, where that is so, there is no privity between the up-country constituent and the Bombay merchant ; both look to the Pakka Adatia alone. That is shown by the defendant's as well as the plaintiffs' evidence. It is further established that the up-country constituent has not an indefeasible right to the contract or contracts into which the Pakka Adatia may enter on the receipt of the order to buy or sell, as the case may be. This is practically involved in Mr. Davar's admission even as narrowed down. But it further rests on the surer basis of the evidence given by the witnesses called in the case." Thus the custom seems to have been so well-known that the evidence of the several witnesses who appeared before the learned Judge, was almost unanimous and differed only in minor particulars. That the

1. (1905) 7 Bom. L. R. 611, 613, 614=30 Bom. 205, 216.

custom was also well known in the market is clearly evidenced from the decision of Davar J. in *Hurmukhrai v. Narotamdass*¹ a decision on the basis that the relationship between the constituent and the Pakka Adatia was that of principal and agent as modified by the custom proved in *Bhagwandas v. Kanji*.²

From the premises it will be seen that there can be hardly any doubt that the Pakka Adatia is a creature of custom. It follows therefore that the dictum of Beaman J. in *Bhagwandas v. Burjorji*³ already cited before, that the Pakka Adatia is a creation as a legal entity of the Bombay High Court is not quite accurate, for the reason that the Pakka Adatia and his business were perfectly well-known in the market before the decision of Chandavarkar J. in *Kanji v. Bhagwandas*⁴ he was simply judicially recognised as a legal entity in the said case by Chandavarkar J. and by Sir Lawrence Jenkins and Batty J. in the Court of Appeal.⁵ From the premises the reader must also have understood how and why the Pakka Adatia was brought into existence both in the commercial and legal worlds. The various decisions on the question under consideration will now be referred to and considered in their order of date.

As to the relationship between the constituent and the Pakka Adatia, Jenkins C. J. observed in the said case of *Bhagwandas v. Kanji*⁶: "The evidence does not (in my opinion) show that the relation between the Pakka Adatia and the up-country constituent is that of mere seller and buyer. Thus the contract makes provision for commission, and that, it has been said, is conclusive to show that to some extent there was the relation of principal and agent: *Armstrong v. Stokes*.⁶ Then again there runs through the evidence the idea that the word "guarantee" is not inappropriate, ... Guarantee in the strict legal sense there can be none; the absence of privity with the Bombay merchant

1. (1907) 9 Bom. L. R. 125.

2. (1905) 7 Bom. L. R. 611=30 Bom. 205.

3. (1913) 15 Bom. L. R. 85.

4. (1905) 7 Bom. L. R. 57.

5. (1905) 7 Bom. L. R. 611=30 Bom. 205, 216-217.

6. (1872) L. R. 7 Q. B. 598, 604.

excludes it. (See s. 126 of the Contract Act). But I doubt whether there was occasion to be so shy of the word in its non-technical sense. On the other hand I do not think there was the relation of principal and agent pure and simple.

I would say here as I did in *Paul Beier v. Chhotalal*,¹ "the case is (in my opinion) not one to be decided by an attempt to bring the contract within the one or the other of the two categories of sale or agency; the provisions of the document are equivocal, some lean towards the one relation, some to the other. Therefore we must examine the document as a whole and in its several parts and also the surrounding circumstances. I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a Pakka Adatia in circumstances like the present is one whereby he undertakes, or—to use the word in its non-technical sense as businessmen on occasion do use it (see *Barker v. M. Andrew*)² guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid; in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

I do not say that there is no relation of principal and agent between the parties at any stage; there may be upto a point, and that this is legally possible is shown by Mellish L. J. in *Ex parte White*³ where he speaks of "a person who is an agent upto a certain point." So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated."

The description of the relationship between the constituent and the Pakka Adatia given by the learned Chief

1. (1904) 6 Bom. L. R. 948, 950=30
Bom. 1, 18.

2. (1865) 34 L. J. C. P. 191, 194.

3. (1870-71) L. R. 6 Ch. App. 397, 403.

Justice just cited was accepted by Davar J. who was the defendants senior counsel in *Kanji v. Bhagvandas*¹ before Chandavarkar J. in a later case, viz. *Hurramkhrai Amolakchand v. Narotamdass Gordhandass*² where the learned judge delivering judgment observed:

"It is necessary at the very outset to remember that the relations established between Gordhandass and the plaintiffs during Gordhandass' life-time were not merely the relations of an ordinary principal and his agents. The deceased Gordhandass in every order he sent to the plaintiffs asked them to act as his Pakka Adatias. ... In 1903 when he employed the plaintiffs as his agents and asked them to work for him on the Pakki Adat system he must be presumed to be fully acquainted with the incidents attaching to that system. What that system is and what are the peculiar incidents attaching to the business between parties whose relations are governed by the system of Pakki Adat as it obtains in the Bombay market and how the ordinary relations of principal and agent are varied and modified under that system was elaborately proved before Mr. Justice Chandavarkar in the case of *Kanji v. Bhagvandas Narotamdass*¹. This case was fully argued before the Appeal Court and the learned Chief Justice's very exhaustive and lucid judgment in *Bhagvandas v. Kanji*³ sets out the relations of the Bombay shroff acting as a Pakka Adatia towards his constituents. Mr. Robertson for the defendants, although carefully refraining from making admissions, has not argued before me or suggested in his cross examination that his clients are not bound by the relations created by their father or that the incidents of the Pakki Adat as found in the case mentioned above as regards an up-country constituent differs with regard to a constituent who resides in Bombay. Having regard to the findings of the Appeal Court in the case I have referred to I hold that when the plaintiffs agreed to act as the Pakka Adatias of Gordhandass, in the words

1. (1905) 7 Bom. L. R. 57.

2. (1907) 9 Bom. L. R. 125, 131.

3. (1905) 7 Bom. L. R. 611=30 Bom. 205.

of that judgment, "they guaranteed that delivery should on due date be given or taken at the price at which the order was accepted or differences paid ; in effect they undertook or guaranteed to find goods for cash or cash for goods or to pay the difference." Under these circumstances it seems to me that the particular sections of the Contract Act discussed before me have no applicability to the present case and the questions in the case must be determined in the light of the findings in the case of *Bhagvandas v. Kanji*.¹

In the next case on the subject², Mr. Justice Batty, who was a party to the decision in *Bhagvandas v. Kanji*,¹ referring to it, observed : "The Pakka Adatia's duties and his relation to his constituent were investigated in *Kanji v. Bhagvandas*³ and defined on appeal¹ as arising from his undertaking to find goods for cash or cash for goods or pay the difference. Thus, I think the liability he undertakes can hardly be classed with that of ordinary buyer and seller bound to find out his creditor at his place of business. He undertakes to find a customer, himself or another, at current prices for his constituent and guarantees payment to the constituent of the profits if any. The evidence in this case shows that he undertakes to send such profits not as a debt due from himself, but as proceeds realised by him on the constituent's behalf at the constituent's charges and custom recognises that he is entitled to such charges as an agent is under S. 217 of the Indian Contract Act, for expenses properly incurred by him in conducting such business. This in my opinion implies that his contract is to do a certain set of services for his constituent which can be performed consistently with the terms of his undertaking at the Pakka Adatia's own place of business."

The same view was taken by Chandavarkar and Batchelor JJ. on appeal⁴. Chandavarkar J. who knew the custom of the Pakki Adat system of transactions by reason

1. (1905) 7 Bom. L. R. 611=30 Bom. 205. 3. (1905) 7 Bom. L. R. 57.

2. (1907) 9 Bom. L. R. 903, 911.

4. (1908) 10 Bom. L. R. 1230, 1232 = 33 Bom. 364, 368.

of his decision in *Kanji Deoji v. Bhagwandas Narolandas* cited before¹ observed as follows :—

“But it was argued that an inference to the contrary must be drawn from certain circumstances, namely, the hundyaman system and loss of interest on hundis in transit. I do not think that it is a necessary inference from those circumstances that they are inconsistent with the custom set up by the plaintiff. It must be remembered that the transaction we have to deal with is one between a principal and his agent. Where the latter has to remit to the former moneys which he has collected for the principal he is certainly entitled to charge all the expenses he has to incur in collecting and sending. The evidence shows that hundyaman is charged on that account as part of the contract. It is but reasonable that if the custom is that an up-country agent should pay to his principal in Bombay moneys collected by the former on the latter's account, the agent ought to debit the principal with charges incurred in remitting the moneys to Bombay ; and that the principal should lose interest during transit.” He then approvingly quoted the passage from the judgment of Batty J. cited above. Batchelor J. concurred in the view of the law as stated above and observed :

“Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges if it stood alone would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to sec. 217 of the Contract Act.”

From the definition of a Pakka Adatia given by Macleod J. in *Bhagwandas v. Burjorji*² already cited before, it would appear as if the learned Judge also thought at first that the Pakka Adatia was an agent because he describes him “as a person who enters into a contract of employment with

1. (1905) 7 Bom. L. R. 57.

2. (1912) 14 Bom. L. R. 807 = 37 Bom. 347.

his constituent for reward." He seems, however, to have changed his views in his later judgments. Beaman J. who tried the suit of *Bhagwandas v. Burjorji*¹ also seems inclined to the view that the relationship between the constituent and his Pakka Adatia was that of principal and agent so that no defence of wager could ever be logically set up against the Pakka Adatia. Upto this time it appears that the trend of authority seemed to be inclined to the view that the relationship between the constituent and his Pakka Adatia was that of principal and agent. The tide seems to have turned against this view after the decision of the Appeal Court consisting of Scott C. J. and Chandavarkar J. in *Burjorji v. Bhagwandas*² where the learned Judges held, that the relationship between the constituent and the Pakka Adatia was that of vendor and purchaser. The learned Chief Justice observed at p. 218 of the report in this connection: "there are in fact no parties to the selling contract but the client and his Adatia who is the buyer. The Adatia is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception." It is interesting to note here that Chandavarkar J. who was the first to recognise the Pakki Adat system of transactions and who first laid down the law relating to this system by his decision in *Kanji v. Bhagwandas*³ and who had also held in the later case of *Kedarmal v. Surajmal*⁴ sitting in appeal with Bachelor J. that the relationship between the Pakka Adatia and his constituent was that of principal and agent, now seems to have changed his view and agreeing with Scott C. J. held that the relationship was that of vendor and purchaser. Macleod J. seems to have held the view from the outset except as pointed out before that the relationship was that of vendor and purchaser. This is clear from his Lordship's judgment in *Chhogmal v. Jainarayan*⁵ where his Lordship observed at p. 758-759 of the report: "It will be noted that there was no privity between these opposite

1. (1913) 15 Bom. L. R. 85.

2. (1913) 15 Bom. L. R. 716, 723=38 Bom. 204, 218.

3. (1905) 7 Bom. L. R. 57.

4. (1908) 10 Bom. L. R. 1230=33 Bom. 364.

5. (1913) 15 Bom. L. R. 750, 758, 759.

contracting parties and the defendants nor according to the customs of Marwaris transacting this business as established in *Bhagwandas v. Kanji*¹ was there any obligation on the part of the plaintiffs to find buyers or sellers. As between themselves and the defendants the business was finished when an order for purchase or sale was accepted, such acceptance apparently being effected by an entry in the Soda Nondh.

Whether the plaintiffs took the risk themselves or covered themselves by selling again was entirely within their discretion. The selling client could not claim as of right the benefit of any covering contracts entered into on the same day as his sales." The learned Judge then cited the passage from the judgment of Scott C. J. in *Burjorji v. Bhagwandas*² just cited above and after briefly referring to the facts of the case, continued at p. 759 of the report: "It must now be taken as established by the authority of the Appeal Court³, that the legal relationship between the client and adatia is that of vendor and purchaser, whether the contract is written or oral or whether, as in this case, an order is sent by telegram and accepted by the Adatia. There is this additional incident to the contract that the Adatia is entitled to charge commission and brokerage in addition to the price. If the client sends goods for the due date the Adatia is responsible for the price whether he has covered himself or not. That the relationship of vendor and purchaser exists between the client and adatia also follows from the decision of Chandavarkar J. in *Kanji v. Bhagwandas*⁴ that the adatia having accepted a selling order from a client for a particular vaida is not obliged to accept a cross buying order from the same client and this view was upheld by the Court of Appeal consisting of Scott C. J. and Batchelor J.⁴ where the same learned Chief Justice remarked: "This is all consistent with the plaintiffs contention that they were Pakka Adatias of the defendant transacting business upon the

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

2. (1913) 15 Bom. L. R. 716.

3. (1905) 7 Bom. L. R. 57.

4. (1914) 16 Bom. L. R. 213, 216=39 Bom. 1, 6.

terms of the Bombay custom described in *Bhagwandas v. Kanji*¹ but it follows that *qua* the defendant they were principals and not disinterested middle men bringing two principals together." It is again interesting to note that Batchelor J. who was a party to the decision in *Kedarmal v. Surajmal*² with Chandavarkar J. and who had held with him that the relationship between the Pakka Adatia and his constituent was that of principal and agent and decided it on that footing, seems also to have changed his view and concurred in holding with Scott C. J. that the relationship was that of vendor and purchaser. Beaman J. seems to have changed his view with regard to the relationship between the constituent and his Pakka Adatia in *Abraham v. Sarupchand*³ a Katchi Adat case in silver transactions where distinguishing the Katcha Adatia from the Pakka Adatia the learned Judge observes: "In the case of a Pakka Adatia the law is quite clear and appears to give expression to the real understanding of those who deal upon Pakka Adat terms in all the great Bombay markets; that is to say, although in name a Pakka Adatia is the agent of his up-country constituent and actually receives a commission from him on that footing, he is for the purpose of all subsequent legal relations between them the principal and guarantees the performance of the contract whether or not he performs it himself or passes it on to other persons. Now, if we carefully sift the evidence led here it would appear that as between the Katcha Adatia and his employer the only real difference is that the Pakka Adatia becomes in the fullest sense a principal contractor thus changing his relation from that of agent to that of principal."

The law on the relationship between the constituent and the Pakka Adatia laid down in *Bhagwandas v. Kanji*⁴ was affirmed in *Bhagwandas v. Burjorji*⁵ by the Privy Council and it would appear from the language used by their

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

2. (1908) 10 Bom. L. R. 1230=33 Bom. 347.

3. Suit No. 542 of 1916 unreported

Judgment dated 23rd Nov. 1916.

4. (1905) 7 Bom. L. R. 611=30 Bom. 205.

5. (1917) 20 Bom. L. R. 561, 564=42 Bom. 373, 377, 378 = 41 I. A. 29.

Lordships in their judgment as if they considered that the relationship between the two was that of principal and agent as their Lordships said that "to determine whether the plea of wager raised by the defendant was applicable, it was necessary to consider the real nature of the relations between the parties to the transactions. The case proceeded in both the courts on the footing that the plaintiffs were employed by the defendant and acted as Pakka Adatias and the description in *Bhagwandas v. Kanji*¹ of the customary incidents of such an employment was applicable to the circumstances of the case even though the defendant was not an up-country constituent and the plaintiffs having acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers and that having made the contracts in exercise of the authority conferred upon them and become liable for the performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those acts were unlawful which their Lordships held they were not. In the course of their judgment, their Lordships said: "Under the sale to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as Pakka Adatias of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment." It will be seen that their Lordships speak of the employment of the plaintiffs as Pakka Adatias, the exercise of the authority by them, their right to an indemnity from their employer for lawful acts done by them against loss and their right to commission as incidents of their employment. This language clearly shows that their Lordships were deciding the case on the footing that the relationship between the constituent and the Pakka Adatia was that of principal and agent.

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

The subject was elaborately discussed by Macleod C. J. in the case of *Manalal v. Radhakissen*¹, where His Lordship after an elaborate discussion of the subject held that the relationship between the constituent and his Pakka Adatia was that of vendor and purchaser and Mr. Justice Fawcett concurred in the view taken by the learned Chief Justice. After stating the facts in the case of *Bhagwandas v. Kanji*² and the incidents of the Pakki Adat system as laid down by Jenkins C. J. in the said case and after citing the passage at p. 216 from the judgment of the learned Chief Justice relating to the relationship between the constituent and the Pakka Adatia cited above, the learned Chief Justice observed as follows:—"Now I shall apply that definition of the relationship of the parties to the facts. When the constituent gives an order to buy, the Adatia is his agent to ascertain the market price. Having done that if he accepts the order he is employed for reward and undertakes to produce the goods at the due date in return for his constituent's cash. But is not an agent a person, who is employed by his principal to do certain things for reward? If A asks B to buy on his behalf certain goods for forward delivery for a commission and B informs A that he has bought the goods, it depends on the terms of the contract of employment whether B undertakes to deliver the goods, whether his seller defaults or not, or whether B is no longer responsible after he has brought the buyer and the seller into contact. Here it is held that by the terms of the contract the adatia is responsible, but more than that his constituent has nothing whatever to do with the seller. He has no interest in the contract and the Adatia can deal with it as he pleases. If the Adatia sells back the goods to the seller at a profit his employer is not entitled to that profit nor of course would he be liable for any loss. But it does seem strange that when the constituent employs the Adatia for reward to do a certain thing, he has no title to what has been done under

1. (1920) 22 Bom. L. R. 1018=45
Bom. 386, 410-412.

2. (1905) 7 Bom. L. R. 611=30 Bom.
205, 216.

his orders. Would it not be much more in consonance with the facts to say that when the constituent asks the adatia to buy or sell it is a contract between those two, that the Adatia will deliver the goods to the constituent for his cash or pay cash for the constituent's goods, in other words, a plain contract of sale or purchase? Once it is established that there is no privity between the constituent and the third parties that the Adatia can make contracts with such parties or not as he pleases, that if he makes contracts, he can cancel them just as it suits him, it all comes to this, the constituent gives an order to buy say 100 Bales Broach cotton for the March vaida at the market rate. The adatia says: "I have bought at 300 which I guarantee to be the market price." He is then liable to deliver the cotton at 300 on the vaida day. It is open to him to cover his liability by buying from a third party at 300 in which case he earns only his commission or he may take the risk himself. In any event even if he does cover himself, he can deal with the covering contracts as he pleases and sell back the cotton if it suits him. There is then an absolutely distinct dividing line between the dealings as between the adatia and his constituent on the one hand and his covering dealings, if any, on the other. Can it matter whether the adatia if he covers does so by means of pakka contracts or wagering contracts? None whatever as far as I can see."

His Lordship continued :—

"Now will be seen the confusion which has arisen owing to the single issue in the case being: "Were the transactions in the suit by way of wager?" The transactions in the suit clearly are the transactions between the plaintiffs and defendants which gave rise to the claim in the suit. The transactions between the plaintiffs and defendants, and the plaintiffs covering transactions could not possibly form the subject matter of one issue. But if the adatia is only in the first place an agent and then a person employed for reward the contract of agency or employment cannot possibly come within the definition of a wagering contract nor could a

contract of agency or employment be referred to as "transactions."

Again at pp. 418-420 the learned Chief Justice said, "It may be that in the language used by Jenkins C. J. in *Bhagwandas v. Kanji*¹ the plaintiffs undertook to find goods for cash or cash for goods, but that, with all due respect, is a purely idealistic description of what a Pakka Adatia may do, and even then is somewhat difficult to understand if analysed. The position of a buying and selling agent is well understood in business circles. An agent may guarantee to buy the goods ordered by the employer, and to deliver them if the money for them is paid, he can also guarantee to sell what his employer sends him and account for the sale proceeds, in other words, that is commission agency business, and stands on quite a different footing to what appears from the evidence in this case to be the business of a Pakka Adatia. It may be that if a constituent orders an adatia to buy cotton the adatia undertakes to find cotton if the constituent will pay, but the converse is ambiguous. Does it mean that if the constituent orders the adatia to sell, the constituent must find the goods and the adatia will in the ordinary course pay over the proceeds to the constituent? But that is a thing which never happens. Or does it mean that the adatia will find the goods to deliver to the person with whom he contracts in return for that person's cash? It would be safer to say that the adatia guarantees to carry out his constituent's orders and the constituent guarantees to indemnify the adatia for all expenses incurred in carrying out those orders. Again, it may be as well to clear the confusion that has arisen by discussing whether the contract is one between principal and principal or between principal and agent. The parties to a contract are always principals but if the contract is one of agency, the contract which the agent enters into in pursuance of the agency may be made by him with a third party : (1) either as agent in which case he is not liable, or (2) as principal without disclosing the fact that he is an agent, in

1. (1905) 7 Bom. L. R. 611 = 30 Bom. 205.

which case the third party has nothing to do with the party employing the agent until he is disclosed, or (3) the agent may be personally liable to the third party as well as the person employing the agent. It follows from the decision in *Bhagwandas v. Kanji*¹ that the contracts made by the adatia belong to none of these classes as the constituent is never brought into contact with the parties with whom the adatia contracts, nor can they ever make the constituent liable if the adatia in his contracts with them defaults. Therefore by a different road the same conclusion is arrived at, that the transactions between the adatia and the third parties have no connection whatever with the transactions between the adatia and his constituent."

Fawcett J who concurred in the view taken by the learned Chief Justice observed at p. 426 of the report: "In the judgment of the court below (at p. 132 of the first Appeal Paper Book) it is said that this evidence showing that to plaintiffs' knowledge defendants never meant real business, "has no bearing whatever upon the other half of the contract, that is to say, the intentions of those who were selling against the defendants' buying orders." This is no doubt correct if the plaintiffs were middlemen, as the lower Court treated them; but it is now common ground that they were on the same footing as Pakka Adatias who as regards his up-country constituent is a principal and not a disinterested middleman bringing two principals together."

In *Harnarayan Jodhraj v. Radhakisan Chandrabhan*² in which case the main question was whether the transactions in suit were wagering, Kotwal A. J. C. held that the relationship between a Pakka Adatia and his constituent was not one of principal and agent but of principal and principal. No authorities seem to have been cited or referred to by counsel in the arguments or by the learned Judge in his judgment. *Tika Ram v. Daulat Ram*³ is decided by Walsh

1. (1905) 7 Bom. L. R. 611=30 Bom. 205. 3. (1924) 46 All. 465=22 A. L. J. 591.
2. A. I. R. (1923) Nag. 324, 326.

A. C. J. and Neave J. of the Allahabad High Court on the footing that the relationship between the Pakka Adatia and his constituent was that of principal and agent as their Lordships described the position of the Pakka Adatia in the following terms at p. 466 of the report: "The plaintiff carries on some sort of trade, probably in grain, though he does not say so, at Bilsa, in the District of Budaun. The defendant works as a commission agent, what is known as Pakka Adatia, probably corresponding to what is known in England as *del credere* agent, that is to say, an agent or factor who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal, but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses, and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the plaintiff, his principal, the amount due after the accounts have been properly settled." And the same view seems to have been taken by Iqbal Ahmed and Sen JJ. in *Champa Ram v. Tulshi Ram*¹ where their Lordships said at p. 82 of the report that "the position of a Pakka Adatia is analogous to that of a *del credere* agent who incurs only a secondary liability towards his principal." Their Lordships added that his (the Pakka Adatia's) legal position was partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent and this statement of the law on the subject was cited with approval by the same High Court in a very recent case². In the first place it may be pointed out that in *Champa Ram v. Tulshi Ram*¹ also no authorities seem to be cited or referred to either in the arguments or in the judgment. In the next place it is submitted with great respect that this statement of the law in the two cases just cited above is not quite

1. (1927) 26 A. L. J. 81.

(1935) All. 1004 = A. L. J. 475.

2. *Meghraj v. Anup Singh* A. I. R.

accurate, because the Pakka Adatia is not an insurer as he insures nothing and nobody, neither is he a surety for the parties with whom he deals for the loss occasioned, if any, by reason of insolvency or something equivalent. What he does is simply this. He retains his character of agent, though at the same time he accepts full responsibility as a principal not only to his own principal, the constituent, whether up-country or local, but also to the third parties with whom he enters into transactions in pursuance of the orders for sale or purchase which he receives from his employer the constituent and which orders he thus carries out for him. The decision in *Champa Ram v. Tulshi Ram*,¹ it is submitted, however, is correct in so far as it decides that the relationship between the Pakka Adatia and his constituent is that of agent and principal. The decision is also right in so far as it holds that the Pakka Adatia's liability does not go to the extent of making him liable to the principal where there are or can be no profits by reason of stringency in the market or something equivalent but not by reason of any neglect on the part of the Pakka Adatia and this could only be so if the relationship was that of principal and agent. It is worthy of note that all these Allahabad cases are decided on the footing of agency and not of sale and purchase.

The case of *Devshi Harpal v. Bhikhamchand*² decided by Marten C. J and Blackwell J where it was held that the Pakka Adatia was entitled to demand margin if the rise or fall in the market justified the demand under proper circumstances and the cases of *Sakerbhai v. Ramniklal*³ and *Meghraj v. Anupsingh*⁴ where it was also held that the Pakka Adatia was entitled to ask for margin show that the relationship between the Pakka Adatia and his constituent is that of principal and agent, for it is the customary right of the Pakka Adatia to ask for margin which is one of the most important incidents of the Pakki Adat system, an incident which goes to prove that the relationship between the two is that of principal and agent.

1. (1927) 26 A. L. J. 81.

2. (1927) 29 Bom. L. R. 147.

3. (1932) 34 Bom. L. R. 709.

4. A. L. R. (1935) All. 1004=(1936)
All. L. J. 475.

In *Nandlal Panalal v. Kisanchand Chaturbhuj*¹ the law laid down by the Allahabad High Court in *Tika Ram v. Daulat Ram*² was accepted as correct and followed and the case was decided on the footing that the relationship was that of principal and agent, though it is true that the transactions which took place in this suit were not Pakki Adat transactions but ordinary commission agency transactions. In *Harakchand v. Sumatilal*³ a case which had a chequered history, Fawcett J who was a party to the decision in *Manalal v. Radhakisson*⁴ with Macleod C. J treated the case as if it was one of agency, though Mirza J thought otherwise and later on Patkar and Baker JJ. also decided the case on the footing of agency. In *Mahomed Haji Hamed v. Jute & Gunny Brokers Ltd.*⁵, Wadia J followed *Tika Ram v. Daulat Ram*² and *Nandlal v. Kissenal*¹ though it is true again that the transactions in this suit also were ordinary commission agency transactions.

Again Shadilal C. J and Walker J in the case of *Parmeshri Das v. Raghab Das*⁶ held that a commission agent doing business on the Pakki Adat system was bound to carry out the instructions of his constituent and if he fails to purchase or sell the commodity at the market rate or to give delivery thereof on the date fixed for the purpose, he is personally liable for the performance of the contract following the decisions of *Bhagwandas v. Kanji*⁷ and *Bhagwandas v. Burjorji*⁸. In the case just cited, the plaintiff had instructed the defendant Pakka Adatia to purchase gold which the defendant had done for the plaintiffs for a particular vaida. Before the due date of delivery the plaintiff sent a wire to the defendant asking him to sell the gold at the market rate, but the defendant failed to carry out the instructions or to

1. (1928) 30 Bom. L. R. 1391.

2. (1924) 46 All. 465=22 A. L. J. 591.

3. (1931) 33 Bom. L. R. 1200.

4. (1920) 22 Bom. L. R. 1018=45 Bom. 386.

5. (1931) 33 Bom. L. R. 1364.

6. (1931) 32 Punj. L. R. 380.

7. (1905) 7 Bom. L. R. 611=30 Bom. 205.

8. (1918) 20 Bom. L. R. 561=42 Bom. 373 P. C.

deliver the gold on the date fixed for the purpose. It was held under those circumstances as stated before that the Pakka Adatia was personally responsible for the performance of the contract. In the first place it is submitted that this decision is not correct in so far as it lays down that the Pakka Adatia was bound to accept the constituent's subsequent order to sell gold as pursuant to the decision in *Bhagchand v. Kanji*¹ the Pakka Adatia having accepted a selling order from a constituent for a particular vaida is not bound to accept a cross-buying order from the same constituent for the same vaida. But this decision is correct in so far as it lays down that the Pakka Adatia is personally responsible for the performance of the contract and thus bound to give delivery of the gold purchased by him on behalf of the constituent on the date fixed for the purpose. It is, however, difficult to understand from this decision what the learned judges thought as to the relationship between the Pakka Adatia and his constituent. It would appear, as if the learned judges thought that it was that of principal and principal inasmuch as they say that the Pakka Adatia is personally liable for the performance of the contract.

The position of the Pakka Adatia in law was also described in *Jotram Shersingh v. Jiwan Ram Sheoli Mal*² by (Bhide and Currie JJ) where Bhide J observed at p. 634 of the report: "According to the defendants the position of a Pakka Adatia is not that of an ordinary agent who merely brings about a transaction between third parties but that he becomes personally responsible and both the buyer as well as the seller look to him alone for the fulfilment of their contract. If the original seller fails to fulfil the contract the Pakka Adatia is bound to find the goods and give delivery or pay damages. If the buyer fails to take delivery the Pakka Adatia can claim damages from him. The Pakka Adatia thus stands on a different footing from that of an ordinary commission agent. The relationship between the parties is

1. (1905) 7 Bom. L. R. 611=30 Bom. 2. A. I. R. (1932) Lah. 633.
205.

that of principal and agent and the Pakka Adatias are liable to render accounts, though the constituents are not concerned with any party except the Pakka Adatias and can look to them alone for the fulfilment of the contracts and consequently no question of actual transactions with third parties arises in these cases".

Blackwell J who decided the case of *Ramgopal Chunilal v. Ramsarup Baldeodas*¹ seemed to be inclined to agree with the law laid by Sir Lawrence Jenkins in *Bhagwandas v. Kanji*² expressly approved by the same learned judge delivering the judgment of their Lordships of the Privy Council in *Bhagwandas v. Burjorji*³ to the effect that Pakka Adatias are agents upto a certain point, viz., the point of the transaction where the price of the goods bought or sold is ascertained, but cease thereafter to be agents and become principals as between themselves and their employers the constituents. The learned judge also seems to think that no question of indemnity arises between the Pakka Adatia and his constituent on the footing of agency, for the constituent looks to the Pakka Adatia for fulfilment of the contract on the due date and is not concerned with what the Pakka Adatia does after the Pakka Adatia accepts an order for his constituent and the Pakka Adatia looks to the constituent likewise for fulfilment of the contract on the due date. The learned judge says that the Pakka Adatia's right of indemnity or reimbursement is in respect of his obligations to find goods for cash or cash for goods or in respect of the differences resulting from the transactions and that this right of indemnity or reimbursement is not, only the right to indemnity to which an agent is entitled, though the word "indemnity" is no doubt commonly used in connection with agents, but that the word 'indemnity' may also be loosely used as a synonym for reimbursement, as for instance, the indemnity or reimbursement to which a purchaser is entitled against the loss

1. Suit No. 864 of 1932 unreported judgment dated 23rd January 1933. 2. (1905) 7 Bom.L.R. 611 = 30 Bom. 205. 3. (1918) 42 Bom. 373 = 20 Bom. L. R. P. C. = 41 I. A. 561.

arising from the fact that his vendor does not deliver goods on the due date and the word in this sense is as much applicable to the relationship of principal and principal as to that of principal and agent.

It is undoubtedly true, that there is some relationship resembling that of buyer and seller between the Pakka Adatia and his constituent, in that, they are treated as principals in their relation to each other, that a Pakka Adatia is entitled to allocate the constituent's order to himself without his knowledge, consent or permission, *i. e.*, to substitute his own contract in fulfilment of an order from his constituent so as to constitute himself as the buyer or the seller in respect of the said order, to enter into cross contracts with another constituent in fulfilment of an order from the first constituent, that he is under no obligation to substitute a fresh contract to meet the order of his constituent, that having accepted a selling order from a constituent for a particular *vaida*, he is not bound to accept a cross buying order from the same constituent, that the constituent, on whose behalf the Pakka Adatia acts, is not in the least concerned with the method or the manner in which he carries out his orders which is a matter fully and solely within the discretion of the Pakka Adatia, that the constituent is not entitled to claim, as of right the benefit of any covering contracts entered into by the Pakka Adatia who is not obliged to carry out an order of his constituent but who is only bound to inform the constituent at once of his inability to carry out the order so as to enable the constituent to put through his order through some other party, that no privity of contract is ever established between the constituent and the third party in Bombay, with whom the Pakka Adatia enters into contracts in pursuance of his constituent's orders, and the business between the constituent and the Pakka Adatia is finished, when the order for sale or purchase is accepted by the Pakka Adatia, that the Pakka Adatia guarantees the performance of the contracts, *i. e.*, becomes personally responsible for the performance thereof not only to his own principal, the

constituent, but also to the third party in Bombay, and his obligations are to find cash for goods or goods for cash or to settle and pay the differences on the due date, even though he may not have covered himself in respect of the constituent's orders, and lastly that the constituent is not entitled to call upon the Pakka Adatia to disclose to him the name of the third party in Bombay, with whom the Adatia may have contracted in pursuance of the constituent's orders.

It may hence be argued that "once we get rid of the notion that the Pakka Adatia is an agent, then it will be abundantly clear that much of the discussion which has been aroused regarding the system is entirely wide of the mark. It is quite true that when one person gains the object he has in view through the assistance of another, the latter may in loose language be called his agent, but it does not follow, that in legal language he is an agent or that there is any contract of agency between the two" and this argument may be supported by the following illustrations: (1) "If I go into a shop and ask for a particular article, and the shopkeeper says "he does not sell that article, but that he can get it for me, and I ask him to do so," it may be said that he is my agent for getting the article, but there is no contract of agency, and if he produces the article I want, and I buy it, he and I are buyer and seller just in the same way as if he had had the article in his shop at the beginning. (2) Similarly, if A, living up-country wants to buy cotton forward, he cannot do so except through the agency of X, who provides him with information as to the market rate, but X is not the agent of A, he is the other contracting party." (3) Again "In the spring I ask my coal merchant to deliver to me 20 tons of coal for the beginning of winter. Through the agency of the coal merchant the coal finds its way to my cellar. He arranges with a colliery to supply the coal, but I buy the coal from him, and he sells it to me, and if any questions arise between us on the transaction, they will be dealt with under the law of sale and not under the law of agency".

In the first place the argument loses sight of sec. 182 of the Indian Contract Act, 1872, (IX) of 1872, which defines an agent "as a person employed to do any act for another or to represent another in dealing with third persons" and the principal "as the person for whom the act is done, or who is so represented." Secondly the illustration of the purchase of an article from the shop-keeper is inapplicable in the case under discussion, for the shop-keeper would not take all this trouble of getting the article from some other shop, unless and until he is paid some remuneration for his trouble or unless he is a friend or an acquaintance and he does so just to oblige him. It is not the case of simple buying and selling the article, but there is something of agency also involved in the transaction. In the illustration of the coal merchant given above, it is said in so many words that it is "through the agency of the coal merchant that the coal finds its way to his cellar." It is thus difficult to understand how there is a contract of sale and purchase and how the illustration goes to prove that the contract is not one which comes under the law of agency. Again, the contention that "similarly if A, living up-country wants to buy cotton forward, he cannot do so except through the agency of X who provides him with information as to the market rate, but X is not the agent of A, he is the other contracting party," is self contradictory, for in one breath, it is said that the transaction is brought about through the agency of some one, but still that some one, through whose agency the contract is made, is the other contracting party. It has already shown above how the personal liability in respect of the contracts entered into by the Pakka Adatia was taken up by him, though he did not altogether give up his character of an agent in the transactions and it is not necessary to repeat the same here. It is submitted that the relationship between the constituent and Pakka Adatia is not simply that of buyer and seller, for if that were taken to be so, it would be simply ignoring and setting at naught the various decisions of the various learned Judges of the Bombay High Court and also of the Allahabad

High Court who have laid it down in unequivocal terms, that there is a relationship of agency in the transactions entered into by the Pakka Adatia under instructions from his constituent.

The relationship between them as pointed out by Sir Lawrence Jenkins in *Bhagwandas v. Kanji*¹ is equivocal, some of the terms of the contract lean towards the one relation, some to the other and therefore one has to examine such relationship as a whole and its several parts and also in its surrounding circumstances. Beaman J expresses similar views in almost identical language.² Kania J also expresses a similar view in a very recent case³ both being Katchi Adat cases.

1. In the first place, the etymological meaning of the word "adat" is agency and that of the word "adatia" is agent or he who carries on agency business. If the contention that the relation between the two is that of buyer and seller only were correct it would be simply setting at nought the etymological meanings of the two words "adat" and "adatia".

2. In the next place the construction of the constituent's order as an offer is not correct, as the wording of the order as a general rule is, in the following terms, viz., "Buy or sell 100 bales of cotton or 100 tons of linseed or a certain quantity of any commodity". If it were an offer from the constituent to the Pakka Adatia, the wording of the order would be, not simply 'buy or sell' but 'will you buy or sell' that is in the form of a request and not an order. The former form clearly shows that it is an order, the latter that it is an offer. The former, being an order, could be addressed by the constituent in this manner to the Pakka Adatia who is his agent employed for reward; the constituent could not have done so if the Pakka Adatia was the

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.
2. *Abraham v. Sarupchand*, suit No. 542 of 1916 unreported Judgment dated 23-11-1916.
3. *Kasturchand Sadasukh v. Chuni-lal Murtidhar*, suit No. 1623 of 1935 unreported Judgment dated 14-9-36.

purchaser as the offer would have been addressed in the latter form.

It may be argued that : "This is not a mere matter of words ; of course A may order B to sell him goods or A may offer to buy goods from B ; and if B accepts and agrees to sell the goods, the result is the same." But with all due respect an order is indeed something quite different from an offer. The Pakka Adatia in his capacity of an agent is bound to carry out his principal's order and he would be liable in damages to his principal, the constituent, if he fails to do his duty when he could have put through the principal's order. If the relationship were that of mere vendor and purchaser, the Pakka Adatia, in his capacity of seller or buyer as the case may be, would be perfectly entitled to reject the offer of sale or purchase of his constituent or to make a counter offer. But this the Pakka Adatia is not entitled to do, as he is primarily an agent, though it is of course quite true that the Pakka Adatia is not bound to accept a constituent for after having accepted a selling order from a constituent for a particular vaida, but this is so by reason of the peculiar custom attaching to this system of transactions.

3. It is admitted on all hands that there are at least two incidents of the system viz., that the Pakka Adatia is entitled to ask for margin and secondly to commission and brokerage. These two incidents go to show that the relationship between the two is that of principal and agent, for if it be contended as sometimes it is that the transaction between them is complete as soon as the order of the constituent is carried out by the Pakka Adatia, in other words, the constituent's order or rather offer is accepted by the Pakka Adatia, it is difficult to understand how the Pakka Adatia would be entitled to ask for margin, inasmuch as the transaction being complete, the fluctuations of the market can have nothing whatever to do with the completed transaction. The right of the Pakka Adatia to ask for margin having regard to the fluctuations of the market after the first order to buy or sell is accepted by the Pakka Adatia and before the closing of the contract

on or before the vaida date by a corresponding order to sell or buy goes to show that the Pakka Adatia is really acting on behalf of the constituent as an agent and it is by virtue of this particular system of Pakki Adat that he becomes responsible to the constituent personally for the carrying out of the order by him. It is this right of the Pakka Adatia to call for margin which distinguishes his transactions from the ordinary transactions of sale and purchase between the constituent and himself and bring them within the category of transactions as between principal and agent. To say that there is no prohibition against one party to a forward contract of sale reserving for himself the right to call for margin, and the other party agreeing to pay margin if it is called for and that it is all a matter of agreement is really begging the question. If A agrees to buy 100 bales of cotton from B and B agrees to sell to A 100 bales forward, that is a complete contract between A and B and each would be bound to give or take delivery of the goods and pay the price respectively in fulfilment of the contract on the due date and the fluctuations in the prices of the cotton do not and cannot affect the contract in the least and no question of the payment of margin is ever conceivable in this case as it is a pure contract of sale and purchase. The fact, however, that the Pakka Adatia is admittedly given by custom the specific right to call upon his constituent to pay margin goes to establish that the Pakka Adatia is also an agent, though he at the same time undertakes personal responsibility for the performance of the contract.

4. Again if the relationship was that of buyer and seller pure and simple, it is difficult to understand why the Pakka Adatia should be paid and entitled to annas eight or any other sum by way of remuneration or reward or commission in respect of his contract which even Macleod C. J. who has all along held that the relationship is that of vendor and purchaser admits is an incident of the Pakki Adat system. It is true strong objection may be taken to the use of the word 'commission' and it may be argued that it is the

use of the word 'commission' which had led to a great deal of unnecessary confusion and this argument may find support from the recent Privy Council decision of *Balthazar & Son v. E. M. Abowath*¹ a firm, in which it was held that the mere mention of commission in the contract assigned is not in any way inconsistent with the relation being that of principal and principal. The Privy council case was, however, decided by their Lordships on the peculiar facts of the case where all the documentary evidence showed that there was a contract as between principals and evidence that the appellants who claimed to act only as agents was negligible. It is submitted that the Privy Council case and the dictum just cited have no application to the case of the Pakka Adatia and his constituent as it was decided on its own peculiar facts. One may venture to ask whether in the ordinary contract of sale or purchase which parties enter into, one of the parties to the contract is ever entitled to charge anything for remuneration at all. The answer it is submitted, must be in the negative. It is and can only be when there is some relationship of principal and agent, that the question of payment of the commission or remuneration, whatever name may be given to it, can ever arise. The commission is paid to the Pakka Adatia for the services which he renders to his constituent. It may be argued that there is no prohibition against the price in a contract of sale being fixed at something higher than the market price. It is submitted that this argument is again not quite accurate. In an ordinary contract of sale and purchase the price is fixed and it is difficult to understand how the seller would be entitled to add something to the market price and what that something can be. Supposing a person wants to buy 100 bales of cotton forward for a certain vaida. If he buys the same direct from the seller, the seller quotes his price and the bargain is concluded on acceptance thereof by the buyer and the seller is bound to deliver the goods at the price fixed and it is difficult to understand how he can

1. (1927) 5 Rang. 1 P. C.

add anything to the contract price, and the same reasoning applies whether the contract is for ready goods or a forward contract for delivery of the goods at a later date and whether the buyer and the seller are at the same place or at different places. Of course in the latter case viz. when they are at different places it may be a matter of contract between the buyer and the seller as to who should bear the cost of carriage but the seller would never be entitled to add any amount by way of commission or brokerage as the Pakka Adatia is by custom admittedly entitled to do. But if a broker is asked to purchase the said bales for him, the broker will purchase the same at the current market price and quote the price after adding to it his commission or brokerage or according to the practice of the Bombay cotton market deduct his commission or brokerage at the time of the submission of his accounts. It is only an agent who is entitled to charge commission and brokerage and the Pakka Adatia being primarily and essentially an agent is entitled by the custom to do so.

5. Again it has been held that the Pakka Adatia is entitled by custom to debit the constituent with certain charges and that he is also entitled to certain credits from him, as the following observations of Mr. Justice Batty who was also a party to the decision of the Appeal Court in *Bhagwandas v. Kanji*¹ with Sir Lawrence Jenkins in the case of *Kedarmal v. Surajmal*² clearly establish. The learned Judge in discussing the evidence as to the custom as to the place of payment observed at pp. 909-910 of the report :—
 “The result of the evidence seems to be...that the constituent always has to bear the loss or take the benefit of exchange ; and that the adatia's liability for interest ceases with the despatch of the Hundi. ...The result is the parties did not agree to terms which could give this Court jurisdiction under clause 12 of the Letters Patent. I think the same result is attained if regard be had to the customary

1. (1905) 7 Bom. L. R. 611=(1906) 2. (1907) 9 Bom. L. R. 903, 909-910.
 30 Bom. 205.

terms as to the constituent's liability for the cost of remittances and as to the adatia's liability for interest. Whether sent by Hundi or by railway, the constituent and not the adatia must pay the charges." The observations of Chandavarkar and Batchelor JJ. on the question of these charges on appeal¹ which have already been cited before are to the same effect. ...Again Macleod J. said in *Chhogmal v. Jaynarayan*² "There is an additional incident to the contract that the Pakka Adatia is entitled to charge commission and brokerage in addition to the price." If the Pakka Adatia is entitled to all these charges by custom, it could only be if the relationship between him and his constituent was that of principal and agent, as in an ordinary contract of sale and purchase between two parties, the question, as to who should bear all these charges would be a matter of contract between them, while the Pakka Adatia is admittedly entitled by custom to all these charges as a matter of right. In other words, the Pakka Adatia is also an agent by virtue of the fact that these matters are regulated by custom and not by contract. This argument may be branded as the strangest argument of all and it has been contended "that there can be no possible reason why certain terms in a course of dealing in sales and purchases between two parties, such as, for instance, cost of carriage, remittance of moneys by hundi or rail, cessation of interest from the date of the despatch of the hundi cannot be fixed by custom." This is simply begging the question. The question under consideration is as to what is the relationship between the constituent and his Pakka Adatia. It is proved by evidence accepted by the Court of Appeal¹ beyond question that these matters are regulated by custom and not by contract. It is no argument therefore to say that there can be no possible reason why these matters cannot be regulated by custom. The fact is that they are regulated admittedly by custom and not by contract and they are incidents of the Pakki Adat system of transactions in which the Pakka Adatia

1. (1908) 10 Bom. L. R. 1230=33 2. (1913) 15 Bom. L. R. 750, 759.
Bom. 364.

is regarded also as an agent of his constituent, though for reasons already stated before he is considered as principal also; at the same time certain rights and privileges were given by custom to the Pakka Adatia and he was also subjected to certain duties and liabilities, as has already been seen before.

6. Again the fact that the relationship between the Pakka Adatia and his constituent is that of principal and agent is shown by the fact that the Pakka Adatia guarantees that the price, at which he carries out the constituent's buying or selling order, is the current price on the day on which such an order is carried out. And in this connection the observations of Mr. Justice Batty in *Kedarmal v. Surajmal*¹ are very pertinent. His Lordship says: "I think the liability he undertakes can hardly be classed with that of ordinary buyer and seller, bound to find out his creditor at his place of business. He undertakes to find a customer, himself or another at the current price for his constituent and guarantees payment to the constituent of the profits if any." Now if the relationship between the two was that of buyer and seller, the Pakka Adatia would not be responsible for the current price, nor would he guarantee the payment of the profits if any to the constituent, for the reason that the buyer or seller is entitled to buy or sell his goods from and to the constituent at such prices as he wishes in complete disregard of the current market prices and the constituent would not in such a case be entitled to recover anything from the Pakka Adatia even on the ground of fraud, as the Pakka Adatia would not guarantee the current price, provided it was a simple case of sale or purchase from and to the constituent by or to him. In his capacity, however, as an agent, a Pakka Adatia would be liable for fraud, provided he buys or sells at a higher or lower rate than the current prices prevalent in the market. If the relationship were that of buyer and seller, there would be no question of fraud at all. The Pakka Adatia would perfectly be entitled to buy from the constituent or sell to him any commodity in which the constituent desires to deal

1. (1907) 9 Bom. L. R. 903, 911.

at such prices as he pleases in complete disregard of the current prices prevalent in the market, nor would there be any question of the payment of the profits hereafter, as the transaction between them is complete.

It may be argued that where one party seeks to buy and sell in a distant market there is nothing to prevent him contracting with the other party who is in the market that the prices he quotes are the current prices. The short answer to this argument is—that the other party will simply refuse to bind himself by any such stipulation or contract; if he is a seller he will say: "This is my price for the commodity, buy it if you please, otherwise don't, I am not going to contract that my prices are the current market prices for I want to sell my things at my prices and I am not concerned with the current market prices" and similarly if the other party is a buyer "he will simply say I will buy the thing at a particular rate; it may or may not be the current market rate; if it is, so far so good; if it is not, it does not matter in the least and I do not care." It is therefore clear that unless the other party is an agent he will never agree to guarantee that the prices that he is quoting are the current prices and the fact, that the Pakka Adatia is bound by the custom to guarantee that he buys or sells in accordance with his constituent's order at the price current on the date the order is carried out, goes to establish that he is primarily and essentially an agent and that he does so as agent.

7. Again the Pakka Adatia's liability does not go to the extent of making him liable to the principal where there are or can be no profits by reason of stringency in the market or for any other reason for the matter of that (except his own negligence or fraud) as was held by the High Court of Allahabad in *Champaram v. Tulshiram*¹ and this could only be so if the relationship was that of principal and agent.

8. Again a Pakka Adatia, if he deliberately refuses or neglects to buy or sell according to his constituent's instructions though he could have carried out the constituent's

1. (1927) 26 All. L. J. 81, 82.

order, he would be liable not only for the performance of the contract, as held in *Parmeshwaridas v. Raghbaldas*¹ by Shadilal C. J and Walker J but he would also be liable in damages to the constituent. No question of damages on this ground could arise as between a buyer and a seller. The passage from the judgment of Batty J in *Kedarmal v. Surajmal*² also points to this conclusion though it does not sufficiently bring it out.

9. A constituent is entitled as a matter of right to file against his Pakka Adatia a suit for account of the agency transactions. Ordinarily a suit for account does not lie between a seller and a buyer or vice versa.

Reasons 8 and 9 were suggested by Mr. Karsondas J. Gandhi solicitor and it is respectfully submitted that the same are correct.

Thus the relationship between the Pakka Adatia and his constituent is not a pure and simple relationship of agency or sale. It is a mixture, if one may use that expression, of the two and as Sir Lawrence Jenkins pointed out in *Bhagwandas v. Kanji*³ it is not possible to bring it within one of the two categories of either sale or agency. In other words, he is a hybrid creature, occupying an intermediate position between a commission and a *del credere* agent, in certain respects something more than both, a legal anomaly, his position in law being extremely difficult to define with precision.

This discussion on the relationship of the constituent and the Pakka Adatia may be closed with one more respectful submission that the view taken by the late Sir Lawrence Jenkins in *Bhagwandas v. Kanji*³ a view followed by Blackwell J in *Ramgopal v. Ramsarup*⁴, to the effect, that it is that of principal and agent upto a certain point, that is "upto the point of ascertaining the price at which the order was to be completed" is not quite accurate, for the reason that the Pakka Adatia is entitled to ask for margin

1. (1931) 32 Punj. L. R. 380.

205.

2. (1907) 9 Bom. L. R. 903, 911.

4. Suit No. 864 of 1932 unreported judgment dated 23-1-1933.

3. (1905) 7 Bom. L. R. 611=30 Bom.

at any stage of the transaction, even after the price has been ascertained and his right to ask for margin is, as has been shown before one of the most important incidents which goes to show that the relationship is that of principal and agent. Another reason why it is not correct to say that the Pakka Adatia is an agent only upto a certain point is that the constituent is also entitled to file a suit against his Pakka Adatia for an account of the dealings and transactions which have been carried on between them. It is respectfully submitted that instead of saying that the relationship is that of principal and agent up to a certain point, it would be more correct to say that the relationship is that of principal and agent for particular purposes irrespective of the fact at what point of time during the whole transaction such purposes may arise.

Before proceeding further, it may be pointed out here that it has been held that the transactions in shares in the Bombay Share Market between share-brokers and their constituents are not entered into between them on the Pakki Adat terms as defined in *Bhagwandas v. Kanji*¹ referred to above, so that the relationship between share-brokers and the constituents is that of principal and agent, and the broker is bound to sell the shares in the market at the proper rate and cannot buy for his constituents his own shares nor sell to him the shares of his constituents. Per Kanga J., in *Fazal D. Allana v. Mangaldas M. Pakvasa*.²

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

2. (1921) 23 Bom. L. R. 1144, 1161-1162.

CHAPTER IV.

THE PAKKA ADATIA AND HIS RIGHT TO CALL FOR MARGIN.

THE question whether the Pakka Adatia is entitled as a matter of right, to call for margin if the rise or fall in the market justifies a demand for margin came up for decision first before Madgavkar J. in *Devshi Harpal v. Bhikamchand Ramchand*.¹ The facts of the case were very simple. The plaintiff acting as Pakka Adatia for the defendant and trading at Jhansi in the United Provinces, entered into a forward transaction for the purchase of 100 bales of Broach cotton for April-May delivery at Rs. 533/- per candy. The rates began to go down and on November 14, 1921, the plaintiff wired through his solicitors to the defendant asking for margin and on the defendant's failure to pay margin, the plaintiff closed the transaction which resulted in a loss for which the plaintiff sued. The learned Judge Madgavkar J held on the facts of the case that the plaintiff was not entitled to close the transaction by reason of the defendant's failure to pay margin as demanded. On appeal² it was held by Marten C. J. and Blackwell J. that according to the custom prevailing in Bombay, the Pakka Adatia is entitled to call for margin if the rise or fall in the market justifies a demand for the margin, but the onus lies on the Pakka Adatia to establish that circumstances have arisen which justified the exercise of his powers. Delivering the judgment of the Court Marten C. J. in this connection said: "The main point in this case is whether the plaintiff's firm of Khemchand Keshavlal were entitled, in the events which happened to call for margin from their constituents the first defendants and to close the contract in default of that margin being provided. The learned Judge found that the plaintiffs firm acted as Pakka Adatias in this transaction, and we see no reason to disturb his finding on that point. That being so, it is admitted that, in accordance with the

1. Suit No. 5785 of 1922 O. C. J. 2. (1926) 29 Bom. L. R. 147, 148, 149.

ordinary practice in Bombay, the Pakka Adatias would be entitled to call for margin if the rise or fall in the market justified a demand for margin. The defendants have set up a special agreement not to charge margin, but, in my opinion that agreement is not made out. In this connection it is material to observe that this special agreement is nowhere alleged in the correspondence before suit, nor is it expressly pleaded. And the defendants evidence that the moneys were to be paid "at the end of the time," viz. the vaida, even if believed, would not necessarily negative the right of the Pakka Adatia to call for margin. For that expression might merely indicate what would be the normal course of business, viz., payment at the vaida.

But although in my judgment the firm had the right, under proper circumstances, to call for margin, the onus clearly lies on them to establish that circumstances arose which justified the exercise of their powers. The decision in *Divanchand v. Weld & Co.*¹ shows that even where the contract purports to give an agent an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion."

It will be seen that in this case no custom as to the right of the Pakka Adatia to call for margin was either pleaded or even sought or attempted to be proved before the Lower Court. It seems that the custom was simply admitted by the parties to the suit to exist before the Court of Appeal. Undoubtedly it is a very unsatisfactory way of proving a custom. It is also certainly anomalous to admit the existence of custom without any evidence in support of its proofs because the mere admission of its existence is something quite different from establishing the same by evidence in support and proof thereof. Again it is anomalous to limit it by reference to the decision of the Privy Council in *Diwanchand v. Weld & Co.*¹ to the effect that even where the contract purports to give an agent absolute discretion as to

1. (1925) 28 Bom. L. R. 1488 P. C.

calling for margin, it is still incumbent on him to show that circumstances exist for the reasonable exercise of that discretion.

However that may be there is no doubt that the custom is very well-known and now established by later decisions which will be presently referred to and which leave no room for doubt whatever on the point.

The next case in which it was held that a Pakka Adatia is entitled to demand margin from his constituent is the case of *Sakarbhai Hukamchand v. Ramniklal Keshavlal*¹ decided by Rangnekar J in which the learned Judge held that a Pakka Adatia was entitled to demand margin money from his constituent before he enters into any transaction, whether an independent transaction or a transaction by way of a covering transaction and the same view was taken by the High Court of Allahabad² where it was held by the learned Judges that according to the mercantile usage prevalent in Ghaziabad a Pakka Adatia was entitled to call for margin money, if the rise or fall in the market justifies such a demand, and, in the event of the demand not being met, he is entitled to close the contract and to sue his constituent for recovery of the loss suffered by them by reason of such default. The learned Judges observed at p. 478 of the report : "If the learned Judge intended to lay down that a custom that entitles a Pakka Adatia commission agent—who qua the persons entering into contracts through him for the purchase and sale of grain or other commodity is himself in the position of a principal—to protect himself from loss by closing the transaction after giving to the seller or buyer reasonable notice of his intention to do so, is immoral and unreasonable, we, with great respect, are unable to agree with that decision.

We are unable to discover any justification for the view that in the case of transactions entered into on the Pakki Adat system a custom or usage that entitles the commission agent to protect himself from loss in the event of the failure

1. (1931) 34 Bom. L. R. 709.

2. *Meghraj Roormal v. Anupsingh*

Battumal A. I. R. (1935) All. 1004=(1935) All. L. J. 475.

of the contracting party to insure him against the loss is either unreasonable or immoral. There is direct contractual relationship between the Pakka Adatia and the purchaser and the seller and he, as principal, is liable to both for the performance of the contract. The failure of a purchaser who has entered into a forward contract for the purchase of some commodity through a Pakka Adatia to take delivery on due date does not exonerate the adatia from the liability to take delivery from the seller in pursuance of the forward contract. It follows that a Pakka Adatia is himself vitally interested in the performance of the contract that has been entered into through him and a custom that provides means to insure the adatia against prospective loss cannot be characterised as unreasonable or immoral. On the contrary such a custom is calculated to check reckless speculation and to promote fair dealing and the transaction of business on honest lines and as such, is reasonable and salutary."

CHAPTER V.

PAKKA ADATIA—NO PROFITS—WHETHER LIABLE.

IN a Allahabad case, viz. *Champa Ram v. Tulshi Ram Jailal*¹ both the plaintiffs and defendants were Pakka Adatias carrying on business at Shahjanpur and Cawnpur respectively and the plaintiffs employed the defendants as their Pakka Adatias to purchase certain bags of cotton seed for them. The defendants made the purchase and under orders from the plaintiffs sold the goods to certain parties. The plaintiffs brought this suit for profits alleged to have accrued due to them and for interest thereon. It was found as a fact that no profits accrued in this transaction because no goods passed through the hands of the defendants to the customers. It was also found that no moneys passed into the hands of the defendants from the plaintiffs for which the defendants were accountable. It was held dismissing the plaintiffs' suit that the defendants were not liable on the ground that the liability of the Pakka Adatia does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market.

1. (1927) 26 A. L. J. 81.

CHAPTER VI.

THE PAKKA ADATIA—AMOUNT CLAIMED—INTEREST—
WHETHER ENTITLED.

THE answer to the question whether the Pakka Adatia is entitled to interest on the amount claimed by him depends upon the question, whether the claim made is a claim for damages or whether it is a claim for money paid by an agent on account of his principal. It is certainly a claim for damages as a Pakka Adatia can, as we have seen, at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal...When, therefore a Pakka Adatia sues relying upon his character not as agent but as principal and thereby deliberately protects himself against inquiries which ordinarily are made about the amounts he has actually expended as agent on behalf of his principal, the claim differs in no respect from that upon an ordinary contract between two principals. It cannot be said that the damages claimed are liquidated damages because by the assertion of his privileged character as Pakka Adatia the Court cannot go behind the rate fixed by the original contract and the rate prevailing at the date of the breach. Viewed in any light, therefore, it ceases to be arguable that a Pakka Adatia suing in the character of a principal can demand interest upon the amount which is thus claimed as ordinary damages for breach of contract. Cf. per Beaman J in *Hukamchand Sarupchand v. Abraham E. J. Abraham*.¹

In the first edition of this work, it was suggested by mistake that the Pakka Adatia is entitled to interest. As a matter of fact from the decision of the learned Judge, it would appear as if he is not entitled to interest in such cases as the claim made is a claim for damages and it is ordinary law that no interest is ever claimable or payable on damages.

1. (1918)=21 Bom. L. R. 783.

CHAPTER VII.

TERM IN A CONTRACT BETWEEN CONSTITUENT AND
PAKKA ADATIA—DECISION OF DISPUTES IN
PARTICULAR COURTS—JURISDICTION.

THE question whether a term in a contract between a Pakka Adatia and his constituent giving jurisdiction only to a particular court in case of any disputes arising between them came up for decision in the case of *Tilakram Chaudhuri v. Kodumal Jethanand*¹ where the plaintiff Pakka Adatia was carrying on business in Bombay and the defendant constituent was carrying on business at Ludhiana. The plaintiffs had their agent at Ludhiana. The defendant placed orders with the plaintiff at Bombay through the plaintiff's agent at Ludhiana for the sale and purchase of several commodities. Each of the contracts was in writing and contained a clause to the effect "that no suits in regard to any matter arising out of this transaction shall be instituted in any Court save the High Court of Judicature at Bombay or the Court of Small Causes at Bombay." On May 13, 1925, the defendant filed a suit against the plaintiffs in the Ludhiana Court for an account of the dealings between the parties. On May 20, 1925, the plaintiff filed a suit against the defendant in the High Court of Bombay for the same relief. The defendant then took out a notice of motion for an order for stay of the Bombay suit until the disposal of the Ludhiana suit. The motion was heard by Rangnekar J and his lordship held that the clause in the contracts about the courts in which suits should be filed was not relevant to the motion. The Court of Appeal consisting of Marten C. J. and Blackwell J decided that the term in the said contract was a binding contract between the constituent and the Pakka Adatia because the intention and object of the insertion of that clause was to save the Pakka Adatia the necessity of being obliged to go to some up-country court with all his books of account and that Sec. 10

1. (1928) 30 Bom. L. R. 546.

of the Civil Procedure Code 1908 which enables parties who have filed a prior suit in one court of competent jurisdiction, viz. the Ludhiana Court to have a stay of a suit later in date in another court, viz. the Bombay High Court cannot prevent the latter court from enforcing contractual rights as between two parties to a contract for the reason that the plaintiff's Bombay action being in pursuance of the contract, the defendant's Ludhiana suit was directly in breach of the contract and the court could not aid the defendant in breach of his own contract.

The decision of *Tilakram Chaudhuri v. Kodumal Jethanand*¹ referred to in this chapter was followed by Addison J of the Lahore High Court in the case of *Kodumal Jethanand v. Tilakram*² which was a suit between the same parties pending in the Ludhiana Court. The learned judge ordered the suit filed by the plaintiff in the Ludhiana Court to be stayed pending the decision of the suit at Bombay, holding that the suit could not only be stayed under the provisions of S. 10 of the Civil Procedure Code, but also under the inherent powers of the High Court and under the powers of general supervision and superintendence vested in it; the learned judge also held that a suit in a particular court could be stayed pending the decision of another suit in a different court, for to allow the former suit to proceed in the face of an injunction issued by the latter court for staying the proceedings of the former, pending the decision of the latter, would amount to an abuse of the court as the injunction issued by the latter would be rendered ineffective.

The principle laid down by the Court of Appeal in *Tilakram's* case was extended in a recent Bombay case, viz., *Baldeosahai Surajmal & Co. v. Shamdas Gopichand & anr.*³ where a notice of motion was taken out by the plaintiffs to restrain the defendants pending the hearing and final disposal of the Bombay suit from proceeding with the suit filed by the second defendant against the plaintiffs and the first defendants in the Sub-Judge's Court at Dera Ismail Khan in Sindh. In this suit the plaintiffs acted in Bombay as the Pakka Adatias of the first defendants who resided at Dera Ismail Khan and they filed this suit claiming from the first defendants a sum of Rs. 4,465 as being due in respect of dealings between the parties. Before the dealings commenced the plaintiffs had sent to the first defendants the terms on which the business was to be done and one of those terms provided that if there was any dispute between the parties, it should be decided only by the Small Causes

1. (1928) 30 Bom. L. R. 546.

2. A. I. R. (1929) Lah. 12.

3. Suit No. 655 of 1937 judgment of Engineer J. dated 24th May 1937.

Court or the High Court of Bombay. The contracts signed by the first defendants in respect of the transactions entered into by the plaintiffs as their Pakka Adatias also contained similar terms.

After the first defendants received a notice from the plaintiffs demanding the amount due to them, the first defendants assigned to the second defendant in consideration of a sum of Rs. 1,000 "all their rights to the rendition of account and the realization of the amount that may be found due by the plaintiffs to the first defendants." On the very next day after the assignment, the second defendant filed a suit at Dera Ismail Khan against the plaintiffs and the first defendants for rendition of accounts from the plaintiffs and for a decree against them for the amount that might be found due on taking such accounts. The plaintiffs, therefore, sought by this motion to restrain the defendants from proceeding with that suit.

The motion came on for hearing before Engineer J who held following the decision in Tilakram's case that the Court had jurisdiction to restrain the defendants from proceeding with the suit at Dera Ismail Khan and issued an injunction against them accordingly. His Lordship held that the second defendant as the assignee of the first defendants would not be in a better position as regards the right to file a suit in any court other than a court in Bombay and that the particular term in the contract as to the filing of the suit in Bombay was equally enforceable against him. His Lordship brushed aside the contention of the defendants that the court had no jurisdiction to grant an injunction against the defendants on the ground that they did not reside within the jurisdiction of the High Court unless they submitted to the jurisdiction of the High Court.

The ground upon which his Lordship based his decision was that it was just and equitable that the defendants should be restrained from proceeding with the suit at Dera Ismail Khan, for his Lordship thought that otherwise it would be a great hardship if the plaintiffs were dragged in breach of

the contract limiting the jurisdiction to the Bombay Courts to a distance of 1,500 miles to dispute the claim of the second defendant at Dera Ismail Khan. It will be seen that this was the very ground given by the Court of Appeal in Tilakram's case.¹ It is also to be noted that in Tilakram's case¹ as well as in this case, the Bombay Court had jurisdiction to try the suit. Attempts were made as usual in both the cases to steal a march over the Pakka Adatia by filing suits in the Ludhiana and Dera Ismail Khan Courts by the defendants with a view to harass the plaintiffs in direct breach of the agreements and the defendants were rightly restrained in both the cases from proceeding with the suits filed by them in up-country courts, viz., the Courts of Ludhiana and Dera Ismail Khan. The point to be noted is that in both these cases the Bombay Court had jurisdiction to try the suits also. The decision in Tilakram's case¹ was also cited with approval in another Bombay case, viz., *Martina Italiana Steamship Co. v. Burjor Framroze*.² Their Lordships pointed out in their judgment that this clause had now become by no means an uncommon one in transactions between commission agents and their constituents but added that each case must be determined by the wording of the particular clause in the contract. It would thus appear that so far as the Bombay High Court is concerned it would certainly enforce terms in contracts like those found in the cases of *Tilakram v. Kodumal Jethanand*¹ and *Baldeosahai v. Shamdas*.³ It appears, however, that the law on the subject is not quite free from doubt especially having regard to a decision of the Privy Council and to certain other decisions of the High Court of Lahore and the Court of the Judicial Commissioner of Nagpur where such questions have cropped up.

The first case on the question under discussion is the case of *Kidri Prasad Chedi Lal v. K. R. Khosala*⁴. In this case it was contended that by reason of a certain clause in the agreement between the plaintiff (a barrister) and the defendants,

1. (1928) 30 Bom. L. R. 546.

Engineer J dated 24th May

2. (1929) 54 Bom. 278 = 32 Bom. L. R. 43.

1937.

3. Suit No. 655 of 1937 judgment of 4. A. I. R. (1923) Lah. 425 (2).

(bankers and contractors) jurisdiction to try all disputes between the parties was given to the Ferozepur Courts alone to the exclusion of all other courts and that therefore the suit was not competent. It was held by the Court consisting of Shadilal C. J and Zafar Ali J overruling this contention that litigants could by agreement *inter se* divest a court of its inherent jurisdiction over the subject matter of a suit no more than they could confer jurisdiction on it by consent where it had none and that therefore the jurisdiction of the court could not be ousted by the agreement between the parties. A similar opinion was expressed by their Lordships of the Privy Council in the case of *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*¹ where Sir John Edge delivering the judgment of the Board said that "parties could not by acquiescence or consent confer upon a court a jurisdiction which it had not got." The dictum of the learned judges in Kidri Prasad's case² just cited was followed by Jallal J in *Jagan Nath Amar Nath v. Burma Oil Co. Ltd.*³ where in the contract of sub-agency it was agreed that all accounts were to be rendered and moneys paid at Karachi where the agent carried on his business and not at Amritsar where the business of the sub-agency was to be carried on and that all disputes, claims or causes of action were to be settled at Karachi and it was held that the special provision in the agreement was intended to confer jurisdiction on the Karachi courts to adjudicate upon disputes if any between the parties and that it was not intended to and could not have the effect of divesting the civil courts in Amritsar of their jurisdiction to entertain suits arising out of the sub-agency which were otherwise cognizable by them, as a part of the cause of action in this case arose in Amritsar where the business of the sub-agency was to be carried on.

It may be noted here though the decision of the Bombay High Court in Tilakram's case⁴ was given in 1928, it was not

1. A. I. R. (1925) P. C. 155=27 Bom. L. R. 872.

2. A. I. R. (1923) Lah. 425 (2).

3. A. I. R. (1929) Lah. 605.

4. (1928) 30 Bom. L. R. 546.

referred to in the case before Jailal J whose decision was given in May 1929.

Tilakram's case¹ was also referred to by Currie J in a recent Lahore case, viz., *Mukandilal Munshilal v. Nur Elahi Abdul Ali*², but the decision of the Court that it had jurisdiction to try the suit was based upon the fact that a part of the cause of action had arisen at Delhi by reason of the fact that goods were made over to the Railway Company at Delhi for consignment. No decision was given by the Court on the question of the condition in the agreement between the parties found in the order form to the effect that all claims were to be decided at Delhi. It would seem as if the court approved of the dictum of the Court of Appeal in *Jagan Nath Amar Nath v. Burmah Oil Co. Ltd.*³ The learned Judge, however, distinguished the case of *Jeranchod v. The Dakore Temple Committee*⁴ before the Privy Council on the ground that it was a case in which the parties sought to have the matter decided by a court which had no jurisdiction.

The last case on the subject is the case of *The National Petroleum Co. v. F. X. Rebello*⁵ where Tilakram's case¹ in the Bombay High Court was distinguished. The facts and the decision of the case are both interesting and important. In this case the defendant company employed the plaintiff as their sub-agent for the sale of their oil at B. & T. The plaintiff accordingly made arrangements for the sale of oil at B and other places and incurred expenditure on that account. The defendant company, however, withdrew some of the places including B & T from the scope of the agency with the result that the plaintiff was forced to give it up. He therefore filed a suit in the court at B to recover damages and a part of the security deposited by him with the defendant company. One of terms of the agency agreement was as follows:—'It is hereby declared that this contract has been made at Bombay and all accounts are to be

1. (1928) 30 Bom. L. R. 546.

2. A. I. R. (1934) Lah. 44.

3. A. I. R. (1929) Lah. 605.

4. A. I. R. (1925) P. C. 155 = 27 Bom. L. R. 872.

5. A. I. R. (1935) Nag. 48.

rendered, explained and settled and returns made and all disputes and causes of action are to be settled in Bombay.' It will be seen that this clause is exactly similar to the one found in the case of *Jagannath Amernath v. Burma Oil Co. Ltd.*¹ which was followed in this case. It was contended on behalf of the defendant Company that by virtue of the said clause in the agreement the plaintiff was precluded from instituting his suit at any place except Bombay. The Lower Court held that notwithstanding the aforesaid stipulation in the agreement it had jurisdiction to try the suit and that the plaintiff could not be compelled to seek his remedy elsewhere. The defendant Company applied in revision and urged that the plaintiff was bound by his own agreement to bring his suit in any court of competent jurisdiction at Bombay and that he should therefore be directed to institute his suit at Bombay; but this contention was overruled and it was held that by a private agreement, the parties could not divest the court of its jurisdiction to try a dispute arising out of the agreement, because it would be against public policy if the parties by private agreement could oust the jurisdiction of the courts. The court did not follow Tilakram's case² on the ground that no objection was raised as to the validity of the agreement on which the decision of the Bombay High Court was given and consequently there was no considered decision given by the court, and observed that, "The jurisdiction of any court is conferred by statute and it can only be taken away by statute. The parties can by mutual consent no more take away the jurisdiction vested by law in any court than they can confer it when it is not so vested by law."

It must be noted that all the Lahore cases and the Nagpur case just cited were cases of ordinary agency between principal and agent. They were not Pakki Adat cases, but it would appear that the principles laid down in these cases so far as the term in the contract restricting the jurisdiction of the courts is concerned would certainly be applicable to Pakki Adat cases also, because after all, the relationship

1. A. I. R. (1929) Lah. 605.

2. (1928) 30 Bom. L. R. 546.

between the constituent and the Pakka Adatia is also that of agency as shown in Chapter III.

It is submitted, however, that the Bombay decisions are right and the Lahore and Nagpur decisions are wrong. Constituents of commission agents or Pakka Adatias generally reside or carry on business up-country. They take away the profits as soon as they accrue. The losses they generally do not pay, but the commission agent or Pakka Adatia who is well known in the Bombay market has to pay the losses incurred by the constituents in the Bombay market whether the constituents pay the same or not. When the commission agent or Pakka Adatia seeks to recover the losses from his constituent, he generally forestalls him by immediately filing a suit at the place at which he resides or carries on business prior to any suit the commission agent or Pakka Adatia may file against him in Bombay, so as to delay payment of the Pakka Adatia's claim and harass him as much and as long as possible. The devices by which they manage to do this are innumerable. In the latest Bombay case before Engineer J the constituent had hit upon a new device by assigning over his right to rendition of accounts etc., to a third party who filed the suit against the Pakka Adatia the very next day after the assignment. Under the circumstances a term in the contract restricting the rights of the parties to file suits in a particular court only viz., generally the court at the place at which the commission agent or Pakka Adatia resides or carries on business is now-a-days generally inserted and the object of the insertion is clear viz., to avoid being dragged to places hundreds and thousands of miles away from the place at which the commission agent or Pakka Adatia resides or carries on business with all his books of account and other documents and papers with all consequent inconvenience, trouble, worry and expense to fight out the suit filed by the constituent against him. The situation can more easily be imagined than described. It is the general experience of the commission agent or Pakka Adatia. The general principle that parties by acquiescence

or consent are not entitled to confer jurisdiction upon courts which they have not got or oust the jurisdiction of the courts which they have got is perfectly correct, but this broad principle must be subject to the salutary exception that in cases where several courts have got jurisdiction in the matter and parties stipulate that suits regarding disputes arising between them in respect thereof should be brought in only one of those courts and should be decided by that court alone, there is no reason why parties should not be held bound by the term in the contract entered into by them with their eyes open as was done in the Bombay cases which so far as they go, do not seem to over-ride the principle laid down in the Lahore and Privy Council cases referred to above because in all these Bombay cases the Bombay High Court, had jurisdiction to try the suits also. The situation was similar in the Lahore and Nagpur cases also, but still the principles laid down in these latter cases were directly opposite to those laid down in the Bombay cases and it is submitted with all respect they are wrongly decided. There does not seem to be any question of public policy being involved in holding parties bound by the terms of their contract so long as there is no attempt to confer jurisdiction upon a court which that court has not or to take away jurisdiction from a court which it has. It is difficult to see anything wrong in holding parties bound to a term in a contract whereby they agree to bring suits only in one of several courts who have jurisdiction in the matter.

CHAPTER VIII.

THE PLACE OF PAYMENT—THE PAKKI ADAT
SYSTEM—JURISDICTION.

ONE of the important questions that arises in the Pakki Adat system of transactions is the question as to the place of payment so as to decide the question of the jurisdiction of the court in a suit by the constituent against the Pakka Adatia or vice versa. The earliest case on the question under consideration is the case of *Motilal Pratabchand v. Surajmal Joharmal*¹ decided by Tyabji J. In this case the plaintiff was a commission agent and merchant carrying on business in Bombay and the defendant was a commission agent and merchant carrying on business at Phulgaon in the Birda Zilla. In 1903-4 certain instructions were given by the plaintiff to the defendant at Phulgaon to enter into certain transactions on behalf of the plaintiff, and the defendant entered into certain transactions as commission agent on behalf of the plaintiff on the footing of Pakki Adat which the learned Judge characterised in his judgment, as a sort of *del credere* agency. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendant at Phulgaon. The plaintiff brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon and applied for leave under cl. 12 of the Letters Patent. The defendants pleaded want of jurisdiction. It was held by Tyabji J that the Court had jurisdiction to try the suit as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff who was at Bombay and (3) the demand was made from Bombay to the defendants at

1. (1904) 6 Bom. L. R. 1038=30 Bom. 167.

Phulgaon and hence the payment of the money was clearly to be in Bombay. The learned judge relied on the maxim that where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is and on the facts of the case and on the correspondence before him, he came to the conclusion that it was agreed between the parties that moneys were to be paid to the plaintiff in Bombay and as payment was to be made to the plaintiff in Bombay, with leave granted under cl. 12 of the Letters Patent, the Bombay High Court had jurisdiction.

The learned Judge followed this decision (his own) in the case of *Kedarmal Bhuramal v. Surajmal Govindram*¹ on the summons before him for revocation of leave under cl. 12 of the Letters Patent and dismissed the summons with costs. Against this order of Tyabji J, the defendant filed an appeal which came on for hearing before Jenkins C. J and Batty J who remanded the case for the determination of the following issue, viz. " Whether the moneys if any due to the plaintiff are payable in Bombay," to be tried as a preliminary issue. In this latter case the plaintiff a Bombay merchant employed the defendant at Akola as his Pakka Adatia. Under instructions from the plaintiff the defendant entered into certain transactions at Akola. On the agency accounts being taken a sum of money became due by the defendant to the plaintiff as his constituent. The plaintiff having sued the defendant for the sum in Bombay, the defendant pleaded that the High Court at Bombay had no jurisdiction to try the suit as no part of the cause of action had arisen in Bombay. As the defendant resided outside Bombay leave of the court was obtained by the plaintiff under cl. 12 of the Letters Patent. The transactions in respect of which the claim was made arose between the plaintiff as constituent in Bombay and the defendant as Pakka Adatia at Akola on the terms described in *Bhagwandas v. Kanji*.² There was no express agreement for payment at any particular place, but it

1. (1907) 9 Bom. L. R. 903.

2. (1905) 7 Bom. L. R. 611=30 Bom. 205.

was pleaded by the plaintiff who was the defendant's constituent as aforesaid, that according to the custom prevailing in the Pakki Adat system of transactions, the place of payment was the place where the constituent resides or any other place to which the constituent may direct the Pakka Adatia to make the payment by remittance or otherwise. Batty J who tried the issue held that a Pakka Adatia has to do a certain set of services for his constituent which can be performed consistently with the terms of his undertaking at his own place of business and in the absence of express or implied promise for performance elsewhere the undertaking gave rise to no cause of action in any other locality, but in the court within whose jurisdiction the Pakka Adatia resides. In other words, the learned Judge held that the custom was not proved and that the constituent was to be paid the moneys due to him by the Pakka Adatia at the place where he desired and that as the plaintiff had not given any directions on that point, no part of the cause of action arose within the jurisdiction of the Bombay High Court and that therefore the suit did not lie. The effect of the evidence of the witnesses both of the plaintiff and the defendant was summarised by Batty J at p. 909 of the report as follows :—"The result of the evidence seems to be (1) that, as the plaintiff admits, no place of payment was fixed by the terms of the contract ; (2) that the place of payment was fixed by custom ; (3) that while plaintiff asserts that according to custom the constituent's place of business was the place of payment, most of his own witnesses admit that where correspondence is silent on the point, payment must be made either where the constituent is or at any other place to which he may direct remittance to be sent and that this is not a matter of courtesy or favour but a rule of business ; (4) that the constituent always has to bear the loss or to take the benefit of exchange ; (5) That the adatia's liability for interest ceases with the despatch of the hundi." The learned judge held that the cause of action was not one arising under the contract within the jurisdiction of the High Court of

Bombay and ordered that the plaint be returned for presentation in a court having jurisdiction. Against this decision of Batty J the plaintiff appealed.¹ It was held by the court consisting of Chandavarkar and Batchelor JJ that in the case of Pakki Adat agency primarily the place of payment was the place where the constituent resides but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court had jurisdiction to try the suit. The learned judge Chandavarkar J characterised the reading of the evidence of the plaintiff's witnesses by Mr. Justice Batty as being not an accurate description of what they had said and came to the conclusion that the custom set up by the plaintiff was proved. The learned judge also held that the effect of the evidence was to prove that a Pakka Adatia's liability ceases when hard cash comes into the hands of his constituent and not when he simply remits the moneys by hundi or cash and in this decision Batchelor J concurred.

The next case on the subject is the case of *Tika Ram v. Daulat Ram*² decided by Walsh A. C. J and Neave J in the High Court of Allahabad. In this case the plaintiff who carried on business in the Budaun District appointed the defendant who lived and carried on business in Bombay as his Pakka Adatia for sale of his goods at Bombay. The contract of agency was entered into by correspondence and the defendant agreed to act as the plaintiff's agent by a letter sent from Bombay. In the course of the dealings between the parties money was remitted by the defendant to the plaintiff at Budaun by postal money orders and hundis and accounts were also sent to him by post. The plaintiff filed a suit in the Sub-Judge's court at Budaun to recover money alleged to be due from the defendant commission agent (Pakka Adatia) on account of profits on sales alleged to be improperly retained by the defendant. The defendant pleaded want of jurisdiction.

1. (1909) 10 Bom. L. R. 1230 = (1909) 33 Bom. 364.

2. (1924) 46 All. 465 = 22 A. L. J. 591.

The main question before the court was whether the cause of action or any part of it had arisen within the jurisdiction of the court at Budaun. It was not proved that any contract had taken place within the jurisdiction of the court at Budaun and the learned Judge at Budaun found against the express agreement set up by the plaintiff and also against the alleged trade custom that the payment was to be made at the plaintiff's own place of residence or business and not to pay at the adatia's place of business and also to settle account there. The learned sub-ordinate judge held that he had no jurisdiction to try the suit and dismissed the same. The plaintiff appealed.

It was contended for the appellant that the sub-ordinate judge had jurisdiction to try the suit on three grounds, viz.:

(1) That the agent was bound to render accounts and pay moneys due thereon at the principal's place of business. (2) That inasmuch as a proposal on the part of the plaintiff to appoint the defendant as his agent was sent to the defendant from Bilsī, where the plaintiff resided, part of the cause of action arose within the jurisdiction of the sub-ordinate judge's court, for if a contract is entered into by correspondence, then the cause of action must be deemed to arise at both places, viz. the place where the offer is made and the place from where the acceptance is sent. (3) On the finding of the lower court, that during the course of dealings between the parties, accounts were sent by the defendant to the plaintiff at Bilsī and money was also from time to time remitted by money orders and hundis at Bilsī, it should have been held according to the trade custom prevailing according to Pakki Adat system in Bombay, that the plaintiff was entitled to sue the defendant at his place of business.

It was held that unless the contract clearly indicates the contrary, an agent of this kind who becomes a factor entrusted with goods of his principal with wide powers has, no doubt, under the appropriate section of the Contract Act, eventually to account to his principal, but the accounting

must necessarily be done at the place where all the business is transacted. The learned judges distinguished the case of *Motilal v. Surajmal*¹ decided by Tyabji J on the ground that the mere fact that instructions were sent by the plaintiff, the principal, in Bombay from Bombay was not sufficient to give jurisdiction in Bombay, as such a ground would be fatal to every defence of this kind relating to jurisdiction and that it had no justification in law and held that the suit did not lie in the court of the Sub-ordinate Judge of Budaun. It may be pointed out that this case was a case under Sec. 20 of the C. P. C. and not under Cl. 12 of the Letters Patent governing the Bombay High Court as to jurisdiction.

The case of *Kedarmal v. Surajmal*² was recently distinguished and *Tika Ram v. Daulat Ram*³ followed by a Divisional Bench consisting of Patkar and Baker JJ in the case of *Nandlal Pannalal Marwadi v. Kisanlal Chaturbhuj*⁴ where the facts were as follows :—The plaintiff was a merchant residing at Bhusaval and he sent bales of cotton for sale to the defendant who was a Pakka Adatia in Bombay, on commission. There was no evidence as to the place where the contract of agency was made ; and it was not shown that the payment was to be made to the plaintiff at Bhusaval. It was not clear as to where the moneys were to be paid, though there was no doubt that the contract was to be performed or the performance thereof was to be completed in Bombay and it was therefore clear that the plaintiff could not establish that the moneys were payable at Bhusaval. The plaintiff sued the defendant in the Bhusaval court to recover Rs. 2000/- from the defendant and for taking accounts. The defendant pleaded that the Bhusaval court had no jurisdiction to try the suit as the cause of action had arisen in Bombay and as he was residing in Bombay. The Bhusaval Court held that it had no jurisdiction to

1. (1904) 6 Bom. L. R. 1038=30
Bom. 167.

2. (1909) 10 Bom. L. R. 1230=33
Bom. 364.

3. (1924) 46 All. 465=22 A. L. J.
591.

4. (1928) 30 Bom. L. R. 1391.

entertain the suit and ordered the plaint to be returned to the plaintiff to be presented to the proper court. On appeal, the order was upheld by the District Judge. The plaintiff then filed an application in revision to the High Court.

It was held, upholding the order of the lower courts that neither the whole nor part of the cause of action arose within the jurisdiction of the Bhusaval court and that therefore that court had no jurisdiction to try the suit. The court approved of the description of the Pakka Adatia given by the High Court of Allahabad in *Tika Ram v. Daulat Ram*.¹ It must be pointed out, however, that though the defendant was carrying on business as a Pakka Adatia in Bombay, transactions between the parties in the suit seem to be on the footing of ordinary commission agency and not on the footing of the Pakki Adat system.

Referring to the case of *Kedarmal v. Surajmal*² the Court observed at p. 1394 of the report : " The principal point in determining the question of jurisdiction would be to ascertain the place where the contract of agency was entered into, or where the contract was to be performed, or where the money in performance of the contract was to be paid. Reference has been made to the decision in the case of *Kedarmal v. Surajmal*, but that was a case where the constituent resided in Bombay and the Pakka Adatia resided outside Bombay and the question turned upon the evidence of custom which showed that the money in performance of the contract of agency was to be paid to a constituent in Bombay. That case has no application to the present case where the constituent is not in Bombay but is outside Bombay. We, however, prefer to follow the view taken in *Tika Ram v. Daulat Ram*¹ where it has been held that unless the contract clearly indicated the contrary, the accounting and the payment by an agent of this kind, namely, Pakka Adatia agent, must necessarily be done at the place where all the business is transacted." Then after referring to some

1. (1924) 46 All. 465=24 A. L. J. 591.

Bom. 364.

2. (1908) 10 Bom. L. R. 1230=33

other cases the learned Judge continued, "Reference was made to the case of *Motilal v. Surajmal*¹ but the rule relied upon in that case, namely, that the debtor must find his creditor is not universally true. Section 49 of the Indian Contract Act lays down a rule which is not consistent with the rule of the common law that the debtor must seek his creditor. In *Tika Ram v. Daulat Ram*² it was held that the common law rule applied in the ordinary case of buyer and seller and the ordinary case of principal and agent but not to a commission agent whose business it is to buy and sell goods on behalf of any person willing to employ him as such."

The Court further observed at p. 1395 of the report : "According to the decision in *Kanji v. Bhagwandas*³ confirmed on appeal in *Bhagwandas v. Kanji*⁴ the Pakka Adatia undertakes or guarantees to find goods for cash or cash for goods or to pay the differences. The accounting and payment by an agent of this character in absence of custom or agreement to the contrary would necessarily be done at the place where the Pakka Adatia's business is transacted."

It may be pointed out here that the facts in the case decided by Patkar and Baker JJ were exactly the converse to those in the case of *Kedarmal v. Surajmal*⁵ in which the Pakka Adatia was an outsider i.e. not a Bombay merchant and the constituent was residing in Bombay ; while in the latter case the constituent was a resident of Bhusaval and the Pakka Adatia was a Bombay man. But this makes no difference as the custom seems to be well recognised and known so far as this Presidency is concerned. In the case of *Kedarmal v. Surajmal*⁵ a custom as to the place of payment to the effect that payment must be made at the constituent's place of residence unless the constituent directs otherwise was pleaded and was held proved by the Court of Appeal.

1. (1904) 30 Bom. 167=6 Bom. L. R. 1038.
2. (1924) 46 All. 465=24 A. L. J. 591.
3. (1905) 7 Bom. L. R. 57.
4. (1905) 7 Bom. L. R. 611=30 Bom. 205.
5. (1908) 10 Bom. L. R. 1230=33 Bom. 364.

In the latter case of *Nandlal Pannmalal v. Kissenlal Chaturbhuj*,¹ neither custom nor agreement was pleaded and the court held that the accounting and payment by an agent of this kind, viz. a Pakka Adatia in the absence of custom or agreement to the contrary would and should necessarily be done at the place where the Pakka Adatia's business is transacted.

The above two cases were referred to with approval by Mr. Justice B. J. Wadia in a recent case² in which as in the case³ before Patkar and Baker JJ just cited and discussed the plaintiff filed a suit for accounts against a commission agent not a Pakka Adatia and leave under cl. 12 of the Letters Patent was obtained by the plaintiff alleging that the defendants carried on business in Bombay and Calcutta and that a material part of the cause of action had arisen in Bombay which allegations the defendants denied and submitted that leave under cl. 12 was improperly obtained and should be revoked. The court held that no material part of the cause of action had arisen in Bombay and that the Bombay High Court had no jurisdiction to entertain the suit. The court following the decision of *Tika Ram v. Daulat Ram*³ and *Nandlal v. Kissenlal*¹ also held that in the absence of a specific agreement between a principal and his agent—whether a Pakka Adatia or a commission agent—both the accounting and the payment by the agent must be made in the place where the business of the agency was transacted.

The two decisions in *Tika Ram v. Daulat Ram*³ and *Nandlal v. Kissenlal*¹ were also followed by the Court of Appeal consisting of Beaumont C. J and Rangnekar J in the recent case of *Devidatt v. Shriram*⁴ on appeal from Blackwell J. The plaintiffs in this case were a firm of brokers and Pakka Adatias carrying on business in Bombay. They wrote a letter to the defendants who did business in Gaziabad in Meerut District stating the terms on which the plaintiff were

1. (1928) 30 Bom. L. R. 139L.

Bom. L. R. 1364.

2. *Mahomed Haji Hamed v. Jute & Gunny Brokers Ltd.* (1930) 33

3. (1924) 46 All. 465=24 A. L. J. 591.

4. (1934) 34 Bom. L. R. 236.

prepared to do business. One of the terms was that monies payable by either party to the other were payable in Bombay. The defendants raised no objection to the terms and they sent instructions from Gaziabad by letters and telegrams for putting through various transactions in wheat and linseed in Bombay. The plaintiff put through the business in Bombay and received payments in Bombay. At one stage of the business the defendants objected that the plaintiffs charged too high a commission and a lower rate was agreed upon at Gaziabad between the defendants and one of the plaintiffs partner who happened to be in Gaziabad. The plaintiffs filed a suit to recover the money due on the transactions entered into on behalf of the defendants. The suit was originally filed against four defendants of whom the second was one A. T. and leave under cl. 12 was duly obtained. Soon after the suit was filed it was discovered that A. T. had died before the date of the suit and defendant no. 2 the minor son of A. T. was joined as a party to the suit by amendment. Another defendant was also joined as a party by another amendment. Although at the time of the filing of the suit, leave was obtained under cl. 12 of the Letters Patent, no further leave was obtained when defendants nos. 2 and 5 were respectively joined. The defendants objected that the court had no jurisdiction as fresh leave was not obtained when defendants nos. 2 and 5 were joined and this contention was upheld by the Lower Court Blackwell J who held that the court had no jurisdiction and dismissed the suit against defendants nos. 2 and 5.

It was contended before the learned Judge that in the case of Pakka Adatias in the absence of any evidence to the contrary, the presumption should be drawn in reference to transactions into which they entered with constituents that the contract was made in Bombay, and that it was intended to be performed in its entirety in Bombay. The learned Judge said that the contention may be true in the absence of evidence to the contrary, which he held there was, and

following the decision of Tyabji J in *Motilal v. Surajmal*¹ held that a part of the cause of action in the suit arose at Gaziabad. His Lordship thought it unnecessary to consider the decision of the Allahabad High Court in *Tika Ram v. Daulat Ram*² which dissented from the view taken by Tyabji J in *Motilal v. Surajmal*.¹ As to the decision of *Nandlal v. Kissenlal*³ his Lordship said that it did not contain anything expressing dissent from the decision of Tyabji J on the facts of the case before him and that it was in reference to a case in which there was no evidence as to the place where the contract of giving was made.

His Lordship's decision was, however, reversed by the Court of Appeal which held that the letter written by the plaintiff was simply an intimation as to the terms on which he was prepared to do business and that no contract of any sort was made at Gaziabad and that the whole cause of action had arisen in Bombay and none the less so because in proving the terms of the contract it might be necessary to give evidence of some facts occurring outside Bombay. It was also held that the defendants did not bind themselves to give the plaintiff any business nor did the plaintiff bind himself to accept any business which was offered. The only contract in each case between the parties consisted of the instructions given by the defendants to the plaintiff in Bombay which the plaintiff accepted by carrying them out and the money sued for was the balance due on these various contracts, that the contracts were all made in Bombay, that they were to be carried out in Bombay and that all payments were to be made in Bombay.

The law relating to the custom as to the place of payment in the Pakki Adat system seems to be in a state of confusion. In *Motilal v. Surajmal*¹ Tyabji J decided the case on the footing that where no specific contract exists as to the place where the payment of the debt is to be made,

1. (1904) 30 Bom. 167=8 Bom. L. R. 591.

1038.

3. (1928) 30 Bom. L. R. 1391.

2. (1924) 46 All. 465=24 A. L. J.

it is the duty of the debtor to find out his creditor and to make the payment where the creditor is. In *Kedarmal v. Surajmal*¹ a custom was pleaded that in Pakki Adat transactions where there is no express agreement for payment at a particular place, the place of payment is the place where the constituent resides or any other place at which the constituent may direct the Pakka Adatia to make the payment by remittance or otherwise and although Batty J held that the custom was not proved, the custom was held to have been proved on appeal by Chandavarkar and Batchelor JJ. A similar custom was pleaded before the High Court of Allahabad in *Tika Ram v. Daulat Ram*,² but their Lordships brushed aside the alleged custom and held that accounting by an agent of this kind, *i.e.* the Pakka Adatia must be done at the place where the business of the agency is transacted and not at the place where the constituent resides. It would appear as if the decision of the Appeal Court in *Kedarmal v. Surajmal*¹ was not brought to the notice of the Court. The decision just mentioned was followed by a Division Bench consisting of Patker and Baker JJ in the case of *Panalal Marwadi v. Kissenlal Chaturbhuj*³ although it may be pointed out that the transactions between the parties in the suit were merely on the footing of ordinary commission agency account and not on Pakki Adat terms, though the defendant was carrying on business as a Pakka Adatia. *Tika Ram v. Daulat Ram*² and *Panalal v. Kissenchand*³ were followed by Mr. Justice Wadia in the case of *Mahomed Haji Ahmed v. Jute & Gunny Brokers Ltd.*,⁴ though in this case also the transactions between the parties were on the footing of commission agency and not Pakki Adat transactions. The said decisions were also followed by the Court of Appeal consisting of Beaumont C. J and Rangnekar J in the case of *Devidatt v. Shriram*⁵ reversing the decision of Blackwell J. Again it was held in

1. (1908) 10 Bom. L. R. 1230=33 Bom. 364.

2. (1924) 46 All. 465=24 A. L. J. 591

3. (1927) 30 Bom. L. R. 1391.

4. (1930) 33 Bom. L. R. 1364.

5. (1932) 34 Bom. L. R. 14.

*Tikaram Chaudhuri v. Kodumal Jethanand Wadhwa*¹ that where there was a binding contract between the Pakka Adatia and his constituent that any suit in respect of the transactions between them should be brought either in the High Court or the Small Causes Court at Bombay, such a contract is binding on the parties and that the parties were in such a case not entitled to sue the other in any court other than the court agreed upon under the terms of the agreement.

It would thus appear as if the custom as to the place of payment has really speaking gone by the board and the only courts which are entitled to entertain a suit relating to Pakki Adat transactions are : (1) the court within whose jurisdiction the Pakka Adatia carries on his business, that is to say where the business of the (Pakki Adat) agency is being transacted ; (2) the court to whom jurisdiction is given by virtue of the terms in the contract between the Pakka Adatia and his constituent. It would also appear that unless there is a contract to the contrary, the constituent would not be entitled to bring a suit at the place where he resides or at the place where he directs the Pakka Adatia to make payment by virtue of the custom set up and proved in *Kadermal v. Surajmal*.² He would be entitled to bring the suit only in the courts mentioned above. And there appears to be a substantial reason why the courts should confine their jurisdiction in cases of this kind to the place where the business of the agency is transacted ; for otherwise the Pakka Adatia carrying on business at one place, say, Bombay, may be dragged to upcountry courts with all his books of accounts and other papers with all consequential inconvenience and loss to his business. In this connection the observations of Walsh C. J in *Tika Ram v. Daulatram*³ and of Martin C. J and Blackwell J in *Tikaram Chaudhuri v. Kodumal Jethanand*¹ are very instructive and pertinent.

1. (1928) 30 Bom. L. R. 546.

R. 1230.

2. (1908) 33 Bom. 364 = 10 Bom. L. 3. (1924) 46 All. 465 = 24 A. L. J. 591.

CHAPTER IX.

PAKKA ADATIA—LIMITATION.

THE question of limitation in the Pakki Adat system of transactions came up for decision in a recent case.¹ In this case the plaintiff who was a Pakka Adatia sued the defendant his constituent in regard to contracts of cotton seeds, cloth bales, etc. in Samvat 1974-75 to recover the sum of Rs. 2000 and odd as balance due on the account with interest. The actual transactions between the parties were as follows: On August 20, 1918, the plaintiff purchased 11 bales of cloth on defendant's behalf for November 18, 1918 vaida. Before the due date, the plaintiff sold 5 bales at defendant's instance on September 7, 1918 and the remaining 6 on September 8, 1918. The defendant admitted the claim for Rs. 479-13-0 only. The trial court held that the plaintiff's allegations were proved and gave him a decree for the amount claimed. The question of limitation seems to have been raised before him, but he held that it could not be contended that the claim was time barred by reason of the defendant's admission. On appeal, the District Judge held that the claim as regards the transaction of five bales of September 12, 1918 was not proved and dismissed the remaining claim on the ground that it was time-barred as he held that limitation ran from the 8th September 1918, observing that he had not overlooked the fact that the soda for 11 bales was of the vaida of Kartak sud 15, corresponding to November 18, 1918, but that it was open to the parties to settle it up even before the due date as the whole contract was fulfilled before the due date. The plaintiff appealed to the High Court. The appeal was heard by Fawcett and Mirza JJ. It was argued by counsel on behalf of the appellant that the article applicable was either Article 65 or Article 120. On the other hand it was argued for the respondent that the article

1. *Harakchand Tarachand v. Sumatilal Chunilal* (1929)

33 Bom. L. R. 1200.

applicable was Article 83. Fawcett J thought that the article that directly applied to the claim was article 83. In his Lordship's opinion the contracts were made through the plaintiff as Pakka Adatia on terms stated by Sir Lawrence Jenkins in *Bhagwandas v. Kanji*¹ approved by the same learned judge delivering the judgment of the Privy Council in *Bhagwandas v. Burjorji*² where it was held that the contract was one of employment for reward and that in so far as the plaintiff made the contracts in suit in exercise of the authority conferred upon him and became liable for their performance, he also became entitled to be indemnified by his employer, against the consequences of the acts done by him, unless those acts were unlawful. His Lordship therefore held that in view of the relationship, the basis of the plaintiff's claim in respect of the loss caused by these cross-contracts was the right to be indemnified and the suit was therefore one upon a contract to indemnity which did not fall either under art. 81 or art. 82 and so came under art. 83, in other words when the plaintiff was actually damnified and that would occur when the plaintiff became out of pocket by payment of the loss incurred on account of the contracts and as it was not clear from the record as to when the plaintiff had paid it, the learned Judge thought that the parties should be heard on the point and if necessary an issue should be framed and sent to the Lower Court for determination. It might be noted that the impression of Fawcett J that the plaintiff was suing on an alleged indemnity or that he had paid anything out of pocket was wrong. Mirza J on the other hand was of the opinion that the cause of action arose on 8th September when the transaction was settled and closed, so that the liability of the respondent in respect of the transaction was then ascertained and settled and the original transaction became merged in the subsequent transaction, and that therefore the amount found due became payable immediately and the period of three years, according to

1. (1905) 30 Bom. 205=7 Bom. L. R. 611. 2. (1917) 42 Bom. 373 P. C.=20 Bom. L. R. 561=9 I. A. 29.

his Lordship, would commence from 8th September 1918. But his Lordship did not refer to any article of the Indian Limitation Act. His Lordship referred to the decisions of Sir Lawrence Jenkins C. J in *Chandulal v. Sidhruthrai*¹ and to *Bhagwandas v. Kanji*² and held that the judgment of lower appellate court was right and that art. 83 of the Limitation Act had no application to the case. The reasons for his decision are stated by his Lordship in his judgment at p. 1207 as follows :—"When the transaction is settled the constituent is immediately, in my opinion, liable to the Pakka Adatia in respect of the difference. That liability, in my opinion, does not depend on the Pakka Adatia proving actual loss or damage to himself as he would have to do in an ordinary agency. He is entitled if he so chooses to appropriate the contracts to himself. The constituent is not interested in the Pakka Adatia's transactions with third parties in pursuance of his employment as Pakka Adatia. The Pakka Adatia is not bound to disclose those transactions to the constituent."

With all due respect it may be pointed out that Mirza J is wrong in thinking that simply because the liability on the transactions was ascertained on the 8th September it necessarily followed that the liability to be sued arose at once on the same day while in the ordinary course it would arise only on the vaida day.

In view of this difference of opinion between the learned Judges, the case was referred to another bench under sec. 98 (2) of the Civil Procedure Code on the point of law on which the learned Judges differed viz. whether the plaintiffs suit was barred by time. And the same accordingly came on for hearing before another bench consisting of Patkar and Baker JJ. After stating the facts of the case and the opinions of the learned Judges just referred to above, the learned Judge Patkar J delivering the judgment of the court said : "The question therefore, arising in the present case is which

1. (1904) 29 Bom. 291, 297=7 Bom. L. R. 165.

2. (1905) 30 Bom. 205=7 Bom. L. R. 611.

article of the Indian Limitation Act applies to the facts of the present case. According to the decision in *Bhagwandas v. Burjorji*¹ when a commission agent enters into a transaction on behalf of his constituent he becomes entitled to be indemnified by his employer against the consequences of the acts done by him unless those acts are unlawful. To the same effect is the decision in the case of *Tika Ram v. Daulat Ram*.² The commission agent has therefore a right to be indemnified in respect of the transactions entered into on behalf of his constituent. Under those circumstances, the learned Judge held that art. 83 of the Indian Limitation Act would apply under which article, time would begin to run when the plaintiff was actually damnified. After referring to the case of *Chandulal v. Sidhruthrai*,³ the learned judge following the decision in *Bhagwandas v. Kanji*⁴ observed, "it may be that when the commission agent allocates the cross-contracts to himself it might be said that he was damnified on the day when the cross-contracts were entered into. If on the other hand he enters into cross-contracts with others it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered." As there was no evidence to show when as a matter of fact the plaintiff commission agent was damnified, the learned Judge thought it desirable that they should send down an issue on the question "When was the plaintiff actually damnified?" The judgment was delivered on 15th November 1929 and a year and half later that is on 12th March 1931 a finding was returned by the lower appellate court to the effect that the plaintiff had been actually damnified on 18th November 1918 that is the vaida day and the learned judges therefore held that the plaintiff's suit was in time as the suit was brought on 18th November 1921. It may be noted here that there was no record to show how

1. (1917) 42 Bom. 373, 377=20 Bom.

L. R. 561 P. C.

2. (1924) 46 All.465=24 A. L. J. 591.

3. (1905) 29 Bom. 291=7 Bom. L. R.

165.

4. (1905) 30 Bom. 205=7 Bom. L. R.

611.

that finding was arrived at, so that it is not known whether the Court considered that the plaintiff was damnified by a payment of out-of-pocket made by him or merely by a balance being struck in his favour on the vaida day.

The question of limitation was also considered in *Ramsarup Baldeodas v. Ramgopal Choonilal*¹ by Blackwell J in the Lower Court whose decision was upheld on appeal in *Ramgopal Choonilal v. Ramsarup Baldevdas*² by Beaumont C. J and Rangnekar J.

In this case the plaintiffs acted as Pakka Adatias of the defendant who was a merchant in Delhi in respect of the defendant's transactions in Broach cotton of April-May 1929 delivery. There were four contracts entered into by the plaintiffs on behalf of the defendant. Each of the first two contracts was for the purchase of one hundred bales of cotton in July 1928 and each of the other two contracts was for the sale of one hundred bales in September and November 1928. The due date under all the contracts was May 25, 1929. The plaintiffs suit was for recovery of the amount upon these contracts. The defendant's contention was that the suit was barred by limitation as the amount was due in respect of contracts and cross-contracts which must be considered to have been balanced and adjusted on the dates of the cross-contracts, (i.e., September and November 1928) on which dates the plaintiffs could be said to have been damnified and not the vaida date which was May 25, 1929.

The plaintiffs gave credit to the defendants for interest by way of rebate for the number of days from the date on which the contracts and transactions were closed in January 1929 upto 25th May 1929 being the due date of the vaida and it was contended that credit would not have been given if the intention of the parties was that the payment of the moneys could have been enforced on 25th January 1929.

The plaintiffs attempted to prove a custom in the market by virtue of which moneys payable by an up-country

1. Suit No. 864 of 1932 O. C. J. un-
reported judgment dated 23rd January 1933.
2. (1933) 36 Bom. L. R. 84.

constituent to a Pakka Adatia became payable on the date fixed by the East India Cotton Association for the ultimate settlement of claim after the due date had passed, but this attempt was subsequently abandoned. The plaintiffs main contention that the due date for payment was the 25th May 1929, the date of the vaida for which the contracts in suit were made as a legal incident of these contracts was not disputed by the defendant and was upheld by the learned Judge overruling the defendant's contention that the moneys became due and payable at the dates of the cross-contracts and holding that the cause of action arose on May 25, 1929, the due date under the contracts and passed a decree against the defendant with costs.

The defendant appealed and the decision of Blackwell J was upheld by the Appeal Court consisting of Beaumont C. J and Rangnekar J. The learned Chief Justice delivering the judgment of the Court observed at p. 86 of the report: "where you have two contracts one for sale and the other for purchase, of the same amount of the same class of goods, *e.g.*, one hundred bales of cotton for settlement on the same day, the obvious intention of the parties is, I think, that the contracts should not be carried out according to their terms but should be treated as balancing each other. I think that in such a case, generally speaking, the parties intend that the contracts shall be cancelled, and that in lieu of the existing contracts, there shall be a fresh contract under which one party has to pay and the other to receive on the due date the difference, and that neither party is to insist on the original contracts being carried out according to their terms. In my view the Court may readily infer such a fresh contract, either from the terms of the instructions for the second contract in referring to an intention to close the first contract, or from the manner in which the contracts have been dealt with in the books, *e.g.*, by treating the first two contracts as cancelled, and replaced by a liability to pay or a right to receive the difference, or by other sufficient evidence. But in my opinion, the liability to pay or receive the

difference on the contracts would only arise, in the absence of agreement to the contrary, on the day fixed for the performance of the original contracts. Now in the present case we have got the plaintiffs evidence as to what was intended when the contracts for sale were entered into. It is quite clear that the intention of the parties was that the contracts for purchase should be treated as cancelled by the contracts for sale, and that in lieu of any liability under those contracts the defendant was to pay and the plaintiff to receive the difference. But, I think, that it is also clear from the plaintiffs evidence that that difference was not to be paid until the due date of the original contracts viz., May 25, 1929. In the witness box the plaintiffs witness stated that on and after November 2, 1928, which was the date of the last of the four contracts, the only right which the plaintiffs had against the defendant was to recover the difference between the purchase price and the sale price and expenses, and that they could only exercise the right on the due date, which was May 25, 1929. The conduct of the plaintiffs is quite consistent with that evidence, because, they sent to the defendant a statement of account of the balance due and deducted interest by way of discount if the money was paid before the due date. In my opinion therefore, the liability of the defendant was to pay this difference, which is the sum sued for, on May 25, 1929."

The case of *Harakchand v. Sumatila*¹ has been criticised and it has been contended that all the trouble in deciding that case arose from the fact that the relationship between the Pakka Adatia and his constituent was not taken to be that of vendor and purchaser, but that of principal and agent. The case just mentioned had a chequered history. It is evident from the report that the counsel and the learned judges who were concerned in the decision of the suit were all clearly labouring under a misapprehension as the arguments and judgments go to show. The only question before the court was, whether the suit was within time and

1. (1929) 33 Bom. L. R. 1200.

whether limitation should have been counted from the date when the contract was closed and settled or from the due date of the contracts and the obvious answer to the question was, that it was the due date from which the period of limitation should have been reckoned and the question whether the suit came within the several articles of the Limitation Act mentioned above was really beside the point. It is common knowledge that when contracts are entered into in any commodity for any particular vaida, it is only on the date of settlement that payments are being given or taken from one side to the other, and not when the contracts are settled and closed, because, before the vaida date arrives, numerous transactions of sale and purchase may take place which may be again closed and settled before the due date and payments may have to be made by one party to the other, but it is only on the due date of the vaida that the payments are actually made. One important fact which goes to show that these payments are made on the vaida day is, that interest is debited or credited to the constituent as and when there is a credit or debit in his account for the number of days beginning from the date of the closing of the transaction to the last due date of the vaida if the constituent desires to receive or make payment as the case may be before the due date of the vaida. This was one of the contentions raised in the later case of *Ramsarup Baldeodas v. Ramgopal Choonilal* before Blackwell J¹ who upheld the said contention and whose decision was confirmed by the Court of Appeal.²

1. Suit No. 864 of 1932 O. C. J. un-
reported judgment dated 23rd

January 1933.

2. (1933) 36 Bom. L. R. 84.

CHAPTER X.

PAKKA ADATIA AND WAGERING.

THE question of the relationship between the constituent and his Pakka Adatia has been discussed in Chapter III which, as pointed out before, has a very important and vital bearing on the question of wager in the system of transactions under discussion and shall be dealt with now.

In order to prove wager, whether in this system of transactions or otherwise, it is necessary to prove that the common intention of the contracting parties was under no circumstances to give or take delivery of the goods contracted for, but only to pay or receive differences. This common intention to wager may or can be made out either from an agreement express or implied or from the surrounding circumstances. The onus of proving that the transactions are wagering, however, lies heavily on the party setting up the defence in this system or otherwise as has now been held in numerous cases old and recent.

The question of wager or no wager in this system depends to a considerable extent on the decision of the question of the relationship between the constituent and his Pakka Adatia; if it is taken to be that of principal and agent, no question of wager can arise and to vitiate the transactions they have to be brought within the provisions of Bombay Act No. III of 1865. If the relationship is taken to be that of buyer and seller, it is otherwise, as in this case the transactions between the Pakka Adatia and the constituent may be by way of wager like any other transactions between two contracting parties and the existence of the Pakki Adat relationship would not of itself necessarily negative the possibility of a contract being a wagering contract. Further the Pakka Adatia against whom the defence of wager in this system of transactions is taken, for it is only against him that the defence of wager can be taken by the constituent, (the Pakka Adatia, as shall be seen later, dared not take up the

defence for reasons too obvious as shall be pointed out hereafter), generally attempts to disprove it by trying to show that he has entered into genuine covering transactions in respect of the orders received from his constituent and that as the covering transactions are real and genuine, his transactions with his own constituent are also genuine and not wagering.

Before proceeding further, it may be pointed out that the incidents of the Pakki Adat system enumerated in *Bhagwandas v. Kanji*¹ were not the result of the findings of the various contentions raised merely to meet the defence of wager, for wager was not even pleaded or sought to be proved either in the Lower Court or in the Court of Appeal as is quite clear from the issues set out by Sir Lawrence Jenkins at p. 212 of the report in his judgment. Again it is wrong to interpret the constituents order as an offer to buy or sell and the Pakka Adatia's carrying out of the order as an acceptance of the offer to buy or sell. It may be an original way of interpreting the transactions between the constituent and the Pakka Adatia, but it does not seem to have been adopted in any of the decisions including the decisions of Macleod C. J. who has laid down in several decisions of his from the very outset that the relationship between the two is that of buyer and seller.

It has been suggested that "the business of the Pakka Adatia is a matter of contract of the simplest description having nothing peculiar in it, but it was the manner in which the Pakka Adatia carried on his business whether he dealt with an amateur or another professional which enabled the defence of wager to be set up against him by the party whom he sought to make liable and to meet this defence he sought to prove that he was only an agent who brought about contracts between buyers and sellers, that all the trouble has arisen because the ingenuity of the lawyer has been exercised to the limit to meet the defence of wager and that the

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

trouble could have been saved if the mass of unnecessary incidents had been brushed aside and it had been declared that the whole business was a matter of simple sale and purchase." It is submitted that the business of the Pakka Adatia is not merely a matter of contract. His business and the manner of carrying it on were sanctioned by the custom of the trade, a custom which was brought into existence by the exigencies of commerce and commercial convenience, as has already been pointed out in Chapter III. It is no doubt true that the relationship between the Pakka Adatia and his constituent is, for all practical purposes, considered to be that of principal and principal as no privity of contract is established between the constituent and the third party with whom the Pakka Adatia contracts, that the constituent never comes into contact with any one except the Pakka Adatia and that he has no concern whatever with any transactions which the Pakka Adatia enters into with third parties, but it is wrong to infer, that because of the reasons just stated, there is no relationship of agency in the business because the Pakka Adatia remains an agent all throughout the transactions and as already pointed out before the relationship between the two can never be brought solely within the category of sale or agency. The real reason why the defence of wager was set up by the constituent against the Pakka Adatia was the unjust attempt on the part of the constituent to evade his liability in respect of the transactions which he entered into through the Pakka Adatia and this he was enabled to do because there was a failure on the part of the learned judges to properly visualise the business carried on by the Pakka Adatia in its true and proper nature and characteristics as they attempted to get over the difficulty merely by trying to lay it down in the later decisions that the transactions between the constituent and his Pakka Adatia fell within the category of transactions between buyer and seller and shut out the evidence of the transactions which the Pakka Adatia in pursuance of the orders received from his constituent entered into with third parties in

Bombay. In other words, the courts have looked at these transactions from the point of view of one kind of relationship only neglecting the other ; and this is the root cause of the trouble. The difficulty and the trouble would and could be avoided and that too to a very large extent, if not completely, if the transactions between the Pakka Adatia and the Bombay merchant were also taken into account on the question of wager, for those transactions would certainly throw a flood of light at least on the intention of the Pakka Adatia with regard to the transactions he enters into on his constituent's behalf pursuant to his orders. Disregarding these transactions is not the right way of approaching the question, because that is taking only a one sided view of the matter. The gordian knot cannot be so easily cut in this way, for the relationship between the constituent and the Pakka Adatia is of a complex and complicated character. It is absolutely essential, that having regard to the law of wager as it stands to-day, all the circumstances (including the circumstance of the Pakka Adatia's transactions with third parties in Bombay) must be taken into account in order to find out the common intention of the parties viz., the Pakka Adatia and the constituent, for the purpose of deciding whether they are simply gambling or wagering with the intention of paying and receiving differences only or whether they are doing genuine business with the intention of giving and taking actual delivery of the goods contracted for and paying for the same.

The observations just made are particularly applicable to the case of the Pakka Adatia and the question of wager in the Pakki Adat system of transactions in view of the law as to wagers including Sec. 30 of the Indian Contract Act, as it stands to-day, as it is, one can say without the least hesitation in a deplorable condition. One fails to see why judges should be compelled to take extra precaution and go over and examine all the surrounding circumstances in order to ascertain whether a contract between two parties who are dealing at arm's length with each other with

a view to do genuine business and which, on the face of it is perfectly valid, is genuine or wagering. But this is the law as laid down in Sec. 30 of the Contract Act and the numerous decisions on the subject. The tendency of the earlier decisions was to regard the defence of wager on quite a different footing from a defence of any other character. The tendency of the later decisions is and rightly so, to regard the defence of wager as dishonest and untenable without strict proof. In this connection the trenchant remarks of Beaman J in *Bhagwandas v. Burjorji*¹ are very pertinent and may be cited with advantage. The learned Judge in the judgment in the case just mentioned rightly observes that "it can hardly be doubted, reading some of the more impressive passages, that their authors felt themselves to be doing a little more than coldly enunciating law; that they felt themselves to be carrying out a moral mission, with the result that all persons holding such views deemed it a matter for congratulation when a Court nonsuited a plaintiff, and gave a defendant relief on the ground of wagering".....The learned Judge further pointed out that though the law aimed at uprooting the evil of gambling and set its face very sternly against it, the attitude which the Indian Courts had adopted in the previous decisions had, instead of reducing the evil of gambling and wagering, on the contrary had exactly the reverse effect, because it assisted dishonest people in taking the gains but refusing to pay the losses, and it is evident that when a Court upholds him in so doing, it does an act calculated not to repress and diminish, but increase and encourage the very evil it strikes at, for nothing is more likely to stimulate gambling among the worst class of gamblers, than to know that while there is at least a chance of being paid if they win, they will certainly not be compelled to pay if they lose. As to the attitude which the courts should adopt when confronted with the defence of wagering, the learned Judge was of opinion that courts should discourage the defence of wager

1. (1912) 15 Bom. L. R. 85.

as far as possible and be always inclined against it on the ground that it was a dishonest defence resorted to only by dishonest people to evade their liabilities, in case losses were incurred by them.

It was in accordance with the sentiments and observations like those expressed by the learned judge and especially having regard to the fact that in the numerous decisions on the question of wager the learned judges have relied upon all sorts of evidence documentary and oral and upon all sorts of circumstances in arriving at the simple conclusion whether the contract entered into between the parties was a wager or not, that it was submitted, in the first edition of this work, that the fact that the Pakka Adatia had entered into real and genuine transactions with third parties in Bombay in pursuance of his constituents orders, was a circumstance out of the many and various surrounding circumstances which ought to be taken into account for the purpose of ascertaining, whether the contract between the constituent and the Pakka Adatia, was wagering or genuine. "It has, however, been said that the evidence of covering transactions is no evidence at all as it is too remote; it has been urged that assuming that the plaintiff has succeeded in proving that his transactions with third parties are not wagering, it can in no possible way help the judge in deciding whether the parties to the suit were wagering and that the position would be the same, even if it should be found that the covering transactions were wagering, because if the evidence of covering transactions is a piece of evidence only not conclusive, then it cannot possibly weigh down the scale one way or the other." The arguments just set out seem to take it for granted that all evidence which is adduced on the question of wager is and must always be conclusive, while as a matter of fact, matters really stand the other way, for the decisions of the courts on the question of wager whether in this system of transactions or otherwise have always been matters of presumption and inference from the evidence led before them, which, it may be said without fear of contradiction, is

generally loose and seldom conclusive. One fails to comprehend under the circumstances why conclusiveness of evidence on the question of wager in the case of the Pakki Adat system of transactions should be enforced with such rigour. Again one fails to understand why the Pakka Adatia should be presumed to be guilty of the intention to gamble and to wager, while there is the important *prima facie* though not conclusive evidence to show that there was no intention, at least on his part to gamble when he has entered into genuine transactions with third parties in Bombay in pursuance of his constituent's orders. No doubt such evidence is not conclusive and cannot be conclusive, on the question whether the transactions between him and his constituent are genuine or wagering, but taking into consideration all the other facts and the surrounding circumstances, it would certainly help the court to arrive at a decision on the question whether the common intention of the Pakka Adatia and the constituent was to wager or to enter into genuine commercial dealings. To argue that the relevancy of such evidence is too remote and to say that it is reducing the relevancy of such transactions to an absurdity is not the right way of looking at the question, because so long as the law of wager stands, as it does today, it is difficult to understand why the relevancy of such evidence in the case of the Pakka Adatia should be ruled out simply on the ground of remoteness when the Court, as has been pointed out before, enters into lengthy and tedious inquiries into various sundry circumstances to ascertain the common intention of the parties. Again to say that "there is no reported case in which there has been any satisfactory evidence of a really genuine transaction, that it was a matter of common knowledge amongst all parties who enter into Pakki Adat transactions that the common intention is to settle them by payment and receipt of differences, that it would require the skill of an artist like Mr. Bateman to depict the consternation on the face of a Pakka Adatia who found himself confronted with the demand of a constituent for the balance of the

goods he had purchased in exchange for his cash, and that the Pakka Adatia is and always has been nothing more than a book-maker accepting bets on commodities instead of race horses is, to say the least, an exaggerated assertion tinged with unnecessary prejudice by far too sweeping and can and will never be accepted by any businessman as it is not borne by actual facts. The truth of the matter is that there is no case reported or unreported, so far as the author is aware, which shows that the defence of wager has been raised by the Pakka Adatia. It can be confidently said without the least hesitation that so far as the transactions on the part of the Pakka Adatia are concerned, they are as a rule genuine and not wagering even though the transactions may be tainted in other respects. People who act as Pakka Adatias are generally respectable and financially substantial businessmen who actually give and take delivery of the goods which they contract to sell or purchase; they generally call upon their constituents when the period of delivery begins to say whether they will give delivery of the goods and take money in cash in return from them and/or vice versa and more often than not delivery is given and taken. The defence of wager has only been raised by dishonest constituents of the Pakka Adatia in order to escape their liability for the losses incurred by them in respect of the transactions entered into by them. The constituent seldom, nay never, objects to the transactions on the ground of wager when he makes profits and pockets the same. The Pakka Adatia who is generally a Bombay merchant has a reputation to lose, and he cannot afford to lose it by raising the defence of wager against his constituent in order to avoid the payment of profits which have accrued due to the constituent by the Pakka Adatia in respect of the transactions and dealings entered into by the former with the latter though he undoubtedly may and does some times take other untenable defences. Moreover if the Pakka Adatia foolishly took up the defence of wager against one constituent he would simply be committing a suicidal act as in that case

other constituents of his, encouraged by such defence, would flock together and attempt to avoid their liabilities in respect of the losses incurred by them by raising the same dishonest defence against him. It is obvious that the Pakka Adatia can never be so stupid as to raise the defence of wager and he generally never dares to do it or does it or has ever done it as the reported cases on the subject prove beyond all doubt or dispute.

The first case on the question of wager in the Pakki Adat system of transactions is the case of *Hurmukhrai Amoluckchand v. Narotamdass Gordhandass*¹ decided by Davar J. This was a suit to recover a sum of Rs. 4000/- and odd in respect of certain transactions entered into by the plaintiff at the request of one Gordhandas Raghunathdas the manager of the joint family firm of the defendants in which the plaintiff acted as the defendants' Pakka Adatia and shroff in respect of several contracts of purchase and sale of linseed deliverable in May 1904 and for purchase of rapeseed deliverable in April and May 1904. On the respective dates of the said contracts, delivery of the 100 tons of linseed and 100 tons of rapeseed had remained to be taken by the defendants in pursuance of the said transactions, but the defendants did not take delivery thereof. Thereupon the plaintiff sold the goods on the defendants' account and the said sales resulted in a loss to the defendants of Rs. 4000/- and odd as and by way of damages in respect of the said contracts and for brokerage etc.

One of the several defences raised by the defendants was that the transactions in suit were wagering transactions. The learned judge held that it was not proved that Gordhandas when he appointed the plaintiff his Pakka Adatia and asked him to register his contracts did not intend to give or take delivery of the goods in which he dealt and merely intended to gamble in differences and passed a decree for the plaintiff. The learned judge followed the decision of the Court of Appeal in the case of *Bhagwandas v. Kanji*² and

1. (1907) 9 Bom. L. R. 125.

2. (1905) 7 Bom. L. R. 611 = (1906) 30 Bom. 205.

held that "when the plaintiff agreed to act as Pakka Adatia of Gordhandas in the words of that judgment," he guaranteed that delivery should on due date be given or taken at the price at which the order was accepted or differences paid. The learned judge also held that the law laid down in the Contract Act as to agency had no application to the case before him and that the questions in the suit must be decided in the light of the findings in the case of *Bhagwandas v. Kanji*."¹ It is to be noted that in this particular case, it was not alleged that the plaintiff had entered into transactions with third parties in Bombay in pursuance of the constituent's order for purchase or sale which he had entered into on behalf of the (Bombay) constituent on the Pakki Adat system. It would appear, however, from the language used by the learned judge as if the learned judge thought that the relation between the constituent and the Pakka Adatia was that of principal and agent, though they were not merely the relations of an ordinary principal and his agent as pointed out by his Lordship in his judgment at p. 131 of the report.

The next case in which the question of wager in this system of transactions was considered is the case of *Bhagwandas v. Burjorji*². The facts of the case, shortly stated, were, that the defendant a young man of about 30 years of age, who never had any regular business and/or any business experience and who had won a St. Ledger Sweep of about a lac and a quarter instructed the plaintiffs who were his Pakka Adatias to enter into a forward contract for the sale of 2000 bales of Broach cotton deliverable in March 1911. This cotton transaction yielded, without any delivery taking place, a profit of Rs. 5,800/- and odd for which the plaintiffs gave credit to the defendant. The defendant thereafter also instructed the plaintiffs as his Pakka Adatias to sell for him three several lots of linseed amounting in all to 4000 tons, for September delivery. It may be noted here that the plaintiffs dealt on a

1. (1905) 7 Bom. L. R. 611=30
Bom. 205.

2. (1912) 15 Bom. L. R. 85.

very small scale in linseed, the receipt of linseed from their constituents for sale in Bombay being on an average not more than 150 tons of linseed in the year. On the strength of the aforesaid order, the plaintiffs sold linseed to the extent of 4000 tons by separate contracts to 39 buyers, but there was no privity of contract between the defendant and the 39 buyers whatever. The transactions took the form of sales by the defendant to the plaintiffs followed by re-sales by the plaintiffs to the 39 buyers, the plaintiffs acting as the defendant's Pakka Adatias and the defendant depositing an aggregate sum of Rs. 61,000 to secure them against loss as margin money. As the market went against the defendant at the end of August, the plaintiffs called upon the defendant either to give delivery of the linseed or to authorise them to purchase linseed on his behalf. The defendant did neither. The plaintiffs purchased and delivered 300 tons of linseed in part fulfilment of their contracts with the 39 buyers and as to the balance of 3700 tons, the contracts were settled with these purchasers by the payment of differences. It appears, however, from the report, as if the purchase of 300 tons had been effected by the plaintiffs with a view to influence the result of litigation, *i.e.*, for the purpose of showing in case the matter went into court, that the transactions were not of a wagering character.

In the contracts made by the plaintiffs with the said 39 buyers, there was a term that delivery should not be given to the firm of N. R. and Co. a firm who were always in the habit of insisting on delivery of produce contracted for, being large exporters and of refusing to settle contracts by the payment or receipt of differences.

The suit came on for hearing before Beaman J who decreed the plaintiffs claim holding that the transactions between the plaintiffs and the defendant were not wagering on two grounds viz. (1) that the transactions between the constituent and his Pakka Adatia could never be vitiated as wagering, provided, that the relationship between the constituent and his Pakka Adatia was regarded as that of principal

and agent, (2) that the plaintiffs had passed on all the defendants transactions to the 39 buyers. His Lordship observed at p. 96 of the report: "If the difficulty of making good a wagering defence is so great (and in my opinion ought to be so great) even in the most questionable forms of forward contracts between two persons, that difficulty is increased a hundred fold and made virtually insurmountable, where as here the defence is raised against a Pakka Adatia. As a legal entity a Pakka Adatia was created by the judgment of Chandavarkar J¹ confirmed in appeal by Jenkins C. J². Briefly and neglecting his one distinguishing characteristic, he is very like an ordinary *del credere* agent. But he is that and more. In the case of any broker or commission agent who is doing honest business, it may well be doubted whether a wagering defence could logically be set up against him. *A fortiori* is this so, where the party suing is a Pakka Adatia. I will not say that there might not be cases in which such a defence could be raised and could succeed. But they would be extremely rare. If, for instance, the defendant could satisfy the Court, that the plaintiff not only knew that he, the defendant, was a pure gambler, but also the party on the other side to whom he had passed on the defendant's order, then no doubt he, the Pakka Adatia, would fall within the provisions of the Bombay Gambling Act III of 1865. So also if, in exercise of his peculiar privilege, the Pakka Adatia appropriated a client's contract to himself. It might then be comparatively easy to show that he knew that his client was a pure gambler, and never meant either to give or take delivery, and a party who knowing that contracts in form either for the giving or taking of delivery must logically be held to know, and therefore to intend, that no actual delivery was to be given or taken under the formal contract. But in a vast majority of cases, having regard to the legal character of a Pakka Adatia, as defined in the judgments of Chandavarkar J¹ and Jenkins C. J² and adding thereto the numerous definitions of what amounts to a wagering agreement and what must be found

1. (1905) 7 Bom. L. R. 57.

2. (1905) 7 Bom. L. R. 611 = 30 Bom. 205.

before the Courts will allow that defence, it appears to me safe to say, generally, that a Pakka Adatia is virtually beyond the reach of that plea. This may be unfortunate, since there can be little doubt that Pakka Adatias in the Bombay market constitute themselves the channel of purely wagering agreements on a very large scale, and seem likely to be able to go on doing so with complete impunity.

But whether unfortunate or not, I think, it can easily be demonstrated that it is so." The learned judge then gave the definition of a Pakka Adatia already cited before in Chapter I and continued. "Leaving that aside, it is evident that a commission agent, who receives an order from a constituent to sell 2000 tons of any staple in the market and proceeds to sell those 2000 tons to perhaps a hundred buyers himself guaranteeing the goods for the money and the money for the goods, is engaged in a transaction which upon no view yet taken of any law of gambling nor under any definition of gambling or wagering could possibly be exposed to that defence. In the present instance the plaintiff-firm have shown that they sold the whole of the defendant's 4000 tons of linseed to various buyers numbering thirty-nine in all. None of those buyers knew who the seller was or for that matter whether any single individual was selling in the market more than the relatively small amount each himself bought. The contracts, both selling and buying, are made in the first instance as between the Pakka Adatia and his client. Thus, in form, the plaintiff was a purchaser from the defendant of the whole of the 4000 tons, and in form it was the plaintiff who sold to these thirty-nine buyers that amount of linseed. Where these contracts are satisfactorily carried out on both sides the Pakka Adatia is remunerated by commission at a slightly higher rate than that ordinarily paid to a common agent; and that is because he undertakes the responsibility of finding goods for the buyer and money for the seller. Where, therefore, a Pakka Adatia, who has been compelled owing to default of his client on one side or the other either to find goods or money,

seeks to recover from that defaulting client the amount he has thus been obliged to pay on his account, it becomes, I think, on the face of it almost impossible to say that as between him and his client any defence of wagering could succeed. There may be very exceptional cases where the defendant could satisfy the court that the Pakka Adatia not only knew that he (the defendant) was merely gambling but that the client whom he found either to buy or sell with the defendant was gambling too ; and if that could be satisfactorily proved then doubtless the intermediary would be affected by the provisions of Act III of 1865 and could neither recover his commission nor any losses he had voluntarily incurred on account of his client. Such a case, I think, could only occur where the Pakka Adatia had handed over a complete order of one client to another and could be shown conclusively to have been fully aware of the intention of both those clients to do nothing more than gamble in differences. Where, however, a client comes in with a large selling order and the Pakka Adatia immediately gives it out in the market to any number of different buyers, it cannot possibly be contended that not one of those buyers, any more than the sellers, ever had the intention of taking delivery." His Lordship therefore decreed the plaintiffs claim laying stress upon the fact that the plaintiffs immediately passed all the contracts to the thirty-nine buyers. The defendant appealed against the said decision.¹ The Appeal Court consisting of Scott C. J and Chandavarkar J held that the transactions in the suit were wagering, reversed the decision of the trial court and dismissed the plaintiffs suit holding that the sub-contracts considering their conditions were not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant while all the other circumstances which had been alluded to pointed to the conclusion that the common understanding was as deposed to by the defendant that he and the plaintiffs should deal in differences and settle in that way. Their Lordships observed in their judgment at

1 *Burjorji v. Bhagwandas* (1913) 15 Bom. L. R. 716=38 Bom. 204.

p. 216 and 217 of the report : " The learned judge says that the contracts both selling and buying are made in the first instance as between the Pakka Adatia and his client and that therefore the plaintiffs in form were the purchasers from the defendant of the whole 4000 tons and in form it was the plaintiffs who sold to the thirty-nine buyers under the covering contracts that amount of linseed. According to the decision in *Bhagwandas v. Kanji*¹ which has been taken in both courts, as correctly stating the customary incidents of the business of a Pakka Adatia, the contracts of the plaintiffs with both sellers and buyers must be regarded as being not only in form but also in substance independent contracts, for the Pakka Adatia may at any time decide to set off one set of contracts, not against those which may have been their occasion and cause, but against some other contracts altogether. The selling client can never claim as of right the benefit of any covering contracts entered into on the same day as his sales but is always bound to be content with the personal guarantee of the Adatia. If then he can never claim advantage from any simultaneous contracts involving to another constituent of the Adatia the reverse of his own operations how can it in fairness be said that if he seeks to establish an intention to gamble, the existence of corresponding buyers on the other side of the Adatia must always leave uncertain the issue as to the real common intention of the parties to his contract ? There are in fact no parties to the selling contract but the client and his Adatia who is the buyer. The Adatia is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception." The learned Chief Justice then continued, "The learned judge says that had this been a transaction between the defendant and the plaintiffs firm themselves, he should in view of the evidence of the purchase of 300 tons of ready linseed bought "for the Court's proceedings" and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

that neither plaintiffs nor defendant at any time had the intention of either giving or taking delivery ; but considering they immediately passed all the contracts on to numerous other purchasers, there was no room left for such a conclusion. But if, as we think it must be assumed, there was no privity between the defendant and the thirty-nine buyers their existence is only relevant if it affords an indication of the intention of the plaintiffs at the time of the defendant's contracts. But the condition in the thirty-nine contracts barring delivery to N. R. and Co. is we think indication of an intention that delivery should not be called for."

The plaintiffs appealed against the said decision of the Appeal Court to the Privy Council.¹ Their Lordships of the Privy Council reversed the decision of the Court of Appeal holding that the case having been decided in both the Lower Courts on the footing that the plaintiffs were employed by the defendant, as his Pakka Adatias and that they having acted as such the description in *Bhagwandas v. Kanji*² of the customary incidents of such an employment was applicable to the circumstances of the case, though it was to be noted that the defendant was not an up-country constituent, that the plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers, that as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those acts were unlawful, that there was no suggestion that the acts of a Pakka Adatia as such were unlawful, that on the contrary, Pakki Adat dealings were well established as a legitimate mode of conducting commercial business in the Bombay Market, that the contract of a Pakka Adatia did not necessarily involve a contract by way of wager though no doubt it may be so, that to constitute such a contract a

1. (1917) 42 Bom. 373= 45 I. A. 29= 2. (1905) 7 Bom. L. R. 611=30 Bom. 20 Bom. L. R. 561.

common intention to wager was essential, that even if one party to a contract was a speculator who never intended to give delivery and even if the other party did not expect him to deliver, that would not convert a contract otherwise innocent, into a wager, nor would the mere fact that as to the greater part of the goods there was no delivery, but an adjustment of claims, vitiate the transactions." Their Lordships therefore held that there was no bargain or understanding between the parties either express or implied, that linseed was not to be delivered nor was it a term of the employment that the plaintiffs should protect the defendant from liability to make delivery. Their Lordships observed at p. 378 of the report: "Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as Pakka Adatias of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment." Their Lordships did not attach any importance to the statement ascribed to the plaintiffs munim that the delivery of 300 tons was made for the purpose of court proceedings or to the clause in the contracts forbidding delivery to Messrs. N. R. & Co. as according to their Lordships, these matters did not throw any doubt on the transactions. As a result their Lordships decreed the plaintiffs suit. This decision of the Privy council has been criticised by Macleod C. J in *Manilal v. Radhakisson*¹ and has also been distinguished by Shah and Crump JJ in *Motichand Maganlal v. Keshavji Appaji*.²

The next case on the question of wager in this system of transactions is the case of *Chhogmal Balkisandas v. Jainarayan Kanyialal*³ (after the decision of the Court of Appeal in *Burjorji v. Bhagwandas*)⁴. (It came on for hearing before Macleod J)⁵. This was a suit filed by the plaintiffs

1. (1920) 45 Bom. 422=22 Bom. L. R. 1018.

2. (1920) 22 Bom. L. R. 406.

3. (1913) 15 Bom. L. R. 750.

4. (1913) 15 Bom. L. R. 716=(1915) 38 Bom. 204.

who were a firm doing business at Bombay against the defendants who were carrying on business at Cawnpore to recover a sum of Rs. 48000 and odd as the balance due by the defendants to the plaintiffs in respect of losses in forward transactions in silver, cotton and linseed in which the plaintiffs had pursuant to the instructions of the defendants acted as the defendants' Pakka Adatias and in which no delivery was ever given or taken and though in two instances actual delivery orders had been given by the plaintiffs in every such instance there were cross entries in respect of such delivery orders. The defendants pleaded an understanding between them and the plaintiffs that no delivery was to be given or taken and that only differences were to be paid. The defendants also denied that plaintiffs acted as their Pakka Adatias. Macleod J the trial judge dismissed the plaintiffs suit holding that the relationship between the plaintiffs who acted as the defendants' Pakka Adatias and the defendants was that of vendors and purchasers as has already been pointed out whilst discussing the relationship between the constituent and his Pakka Adatia from the passages already cited from his Lordship's judgment. After considering the course of dealings between the parties and the position in law of a Pakka Adatia in relation to his client, the learned judge held that no circumstance proved before him could lead him to suppose that the parties had any intention of doing anything more than gamble on the rise and fall of prices in silver, cotton etc., and that the whole of the evidence was in favour of a common understanding that the parties should deal in differences and settle in that way. The learned judge accordingly decided the suit in favour of the defendant, but did not award him his costs. The learned judge observed at page 761 of the report: "Now that it can be taken as settled that there is no privity between the clients who give orders to a Pakka Adatia and the persons who buy and sell from and to the Pakka Adatia the existence of the latter can only be relevant if it affords an indication of the intention of the Pakka Adatia at the time of his accepting the clients' orders.

See per Scott C. J. in *Burjorji v. Bhagwandas*¹. Even then it does not seem to follow as a matter of course that because the Pakka Adatia intended to do genuine business with his buyers and sellers he also intended to do genuine business with his clients." His Lordship therefore dismissed the suit on the ground that the transactions between the plaintiff and the defendant were wagering. The judgment of the learned judge was upheld by Scott C. J. and Chandavarkar J. on appeal². The learned Chief Justice observed that: "the denial on the one side by the defendant and the assertion on the other of the plaintiffs' employment as Pakka Adatias were probably made with a view to support the respective cases of wager and no wager but for the reasons given by the court in *Burjorji v. Bhagwandas*, we are of opinion that the existence of the Pakki Adat relationship does not of itself negative the existence of an understanding between the adatia and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered." Then after referring to the books of account of the parties and to the other evidence in the case, their Lordships observed "This is all consistent with the plaintiffs contention that they were Pakka Adatias of the defendant transacting business upon the terms of the Bombay custom described in *Bhagwandas v. Kanji*³, but it follows that qua the defendant they were principals and not disinterested middlemen bringing two principals together. The question then which we have to decide is what on the evidence was the common intention of the parties with regard to the settlement or completion of the transactions referred to in the account annexed to the plaint." Their Lordships after a critical examination of the evidence affirmed the decision of the lower court and held the transactions in the suit to be wagering and gambling and dismissed the plaintiffs'

1. (1913) 38 Bom. 204 C.A.=15 Bom.
L. R. 716.

2. (1914) 39 Bom. 1, 5, 6=(1915) 16

Bom. L. B. 213, 215, 216.

3. (1905) 7 Bom. L. R. 611=30
Bom. 205.

suit ordering the plaintiffs to pay the defendants costs of the suit and appeal.

It might be noted that the decision of the Court of Appeal in this case was given following their own decision in *Burjorji v. Bhagwandas*¹ before the decision of the Privy Council in the latter case on appeal².

The next case on the question under consideration is that of *Motichand Magandas v. Keshav Appaji*³ where the facts were as follows :—The suit was to recover the amount due in respect of certain contracts entered into between the plaintiffs and the defendants which the trial court found as wagering. Some of the contracts the plaintiffs had allocated to themselves, while the rest were placed by them with third parties by way of cover for their contracts with the defendants. It appears from the report as if none of the contracts between the plaintiffs and the defendants were settled in any other manner than by payment of differences and no delivery was ever asked for or given.

The trial Court held that the contracts which the plaintiffs had allocated to themselves were wagering contracts, but that the contracts which the plaintiffs had placed with third parties by way of cover were not shown to be wagering and were binding on the defendants. The lower appellate court Mr. G. D. Madgaokar, District judge of Khandesh afterwards a judge of the High Court of Bombay, held on the evidence that the common intention of the parties was to deal in differences only and to wager, and that it was a matter of indifference whether with a view to avoid the risk of certain contracts with the defendants the plaintiffs entered into contracts with third parties and therefore disallowed the plaintiff's claim as regards all the contracts with the defendants.

On appeal to the High Court the case was argued on the assumption that the contracts in question were subject to the incidents of the Pakki Adat system as mentioned in

1. (1914) 16 Bom. L. R. 716=38 29=20 Bom. L. R. 204.
Bom. 204.
2. (1917) 42 Bom. 373=45 I. A.
3. (1920) 22 Bom. L. R. 406.

*Bhagwandas v. Kanji*¹ and the decision of the Appeal Court below was also on the same basis, even though the plaintiffs (Pakka Adatias) were carrying on business at Amalner and not in Bombay as was the case in *Bhagwandas v. Kanji*¹ and it was common ground that the plaintiffs were Pakka Adatias and had done business with the defendants as such. It was contended on behalf of the plaintiffs relying on the judgment of *Bhagwandas v. Burjorji*² that as they were Pakka Adatias and had entered into contracts on the Pakki Adat system with third parties to cover contracts entered into by them with the defendants, the intention of those third parties must be shown to be the same as the intention of the defendants to deal in differences only and to wager, and that it was not sufficient to show that the common intention of the plaintiffs and the defendants was to wager.

It was contended for the defendant respondents that as it was found as a fact that the common intention of the parties was to wager, it was not essential to prove as a matter of law that the intention of the parties with whom the plaintiffs entered into contracts also was to wager. In other words, it was contended that it being a finding of fact based on evidence it ought to be accepted in second appeal and their Lordships accepted this contention of the defendants as there was no error of law. The only error of law suggested was that it was necessary for the defendants to establish that the third parties, with whom the plaintiffs had entered into contracts to cover the contracts with the defendants, had the same common intention. Dealing with the question under consideration, the learned Judge Shah J said at p. 409 of the report: "If the plaintiffs are Pakka Adatias, they enter into contracts with the defendants, and the defendants have nothing to do with the contracts of the plaintiffs with third parties. The position of a Pakka Adatia differs in this respect from that of an ordinary commission agent as pointed out in *Bhagwandas v. Kanji*¹. I do not see how it could be said as a matter of law that the common intention of the

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

2. (1917) 42 Bom. 373=45 I. A. 29=20 Bom. L. R. 561.

third parties to wager must be proved. All that could be said is that the common intention of the two contracting parties (*i.e.*, the plaintiffs and defendants) must be proved, and that in determining that fact on evidence the court ought to take into account as a piece of evidence the circumstance that the Pakka Adatias have entered into contracts with third parties which are not wagering contracts to cover their contracts with the defendants, and that if the Pakka Adatia's contracts with the third parties represent genuine business transactions and not wagers, it may be said he had similar intention in entering into contracts with the defendants. But it would not be conclusive on the question of the common intention of the parties. The judgment of their Lordships of the Privy Council in *Bhagwandas v. Burjorji*¹ shows that on an appreciation of the evidence in that case their Lordships were not satisfied as to the common intention of the parties; and in dealing with the evidence the circumstance that the third parties were entitled to call for delivery was taken into account. But the question that is considered is whether the parties had the common intention to wager. I do not think that this judgment shows that as a matter of law it is essential to prove not only that the Pakka Adatia and his constituent had the common intention of wagering but that even the third parties with whom the Pakka Adatia entered into contracts had the same intention, in order to establish that the contracts between the Pakka Adatia and his constituent are wagers. In the present case it seems to me that on the evidence the common intention of both the parties is found and that there is no error of law which can vitiate it. The remarks of the lower appellate court relied upon as disclosing an error of law when read with reference to the context, mean in effect that the common intention of the parties is clearly disclosed by their uniform course of conduct and that the fact of the plaintiffs having entered into contracts with third parties does not matter under the circumstances."

1. (1917) 42 Bom. 373 = (1917) 45 I. A. 29 = (1917) 20 Bom. L. R. 561.

The next important case on the question under consideration is the case of *Manilal Raghunath v. Radhakisson Ramjiwan*¹. The facts of the case were as follows :—The plaintiffs alleged that they were employed in Bombay as “Pakka brokers” (that is Pakka Adatias) by the defendants doing business in the Berars to enter into forward contracts of sale and purchase of cotton on their behalf in Bombay. Under instructions of the defendants who were advised by the plaintiffs about the state of the market from time to time the plaintiffs entered into a number of transactions of sale and purchase of cotton on defendants behalf. The accounts between the plaintiffs and the defendants were adjusted from time to time and according to the plaintiffs the defendants losses at the date of the suit amounted to about Rs. 20000, the greater portion of the same relating to differences which resulted from cross-contracts. Not a single contract in the usual form was signed. The whole business from start to finish was transacted by book entry, the defendants being debited with the cost of purchases and credited with the price of sales. The plaintiffs would make nothing except their brokerage. The plaintiffs having sued to recover the said amount, the defendants contended, inter alia, that the transactions in which they employed the plaintiffs were gambling and wagering transactions and that it was well understood between the parties that no delivery was ever to be given or taken in respect of them and that the plaintiffs were to enter into such transactions only. In support of the said contention the defendants relied upon the surrounding circumstances and in particular upon the correspondence between the parties and the actual course of dealing which showed that the transactions were not intended to be anything more than mere debit and credit entries and were to be settled by payment of differences only. The trial court Beaman J decreed the plaintiffs claim and directed an account to be taken, holding that the transactions were not wagering

1. (1920) 22 Bom. L. R. 1018=(1921) 45 Bom. 386.

contracts and that the plaintiffs merely occupied the position of middlemen or ordinary brokers.

The learned trial judge Beaman J treated the case as not falling within the decision in *Burjorji v. Bhagwandas*¹ and said that he did not think that any valid distinction could be drawn between Pakka and Katcha brokers and accordingly decided the case on the footing that the transactions between the parties fell within the category of transactions between principals and agents and that the plaintiffs were merely middle-men or ordinary brokers of the defendant. The learned judge observed at p. 392 of the report: "For, speaking generally, I think the proposition must be true that a wagering defence would never be established against a mere agent whose real contract goes no further than commission or brokerage which he is entitled to demand for his services to his principal. So restricted, as between the principal and the agent, there never could be any question of wagering." And again at p. 395 the learned judge observed, "However a case may stand between principal and principal, it is obvious that it must be enormously complicated as soon as a wagering defence is raised against a mere agent." x x x

"I do not propose to touch upon the evidence in detail partly because of its intrinsically bad quality, and partly because all the facts material to be known are virtually admitted. I am satisfied that the defendant has not been able to prove either that he himself never at any time meant to give or take delivery of the goods covered by these contracts, or that the plaintiffs were aware of such intention if he had had it, much less that the parties, who sold, held similar intentions and that the plaintiffs were aware of that also. I must, therefore, hold that these contracts were not wagering contracts." The defendants having appealed, it was urged on their behalf that the trial Court erroneously allowed the plaintiffs in the course of their reply to alter their case which was that of a Pakka broker (which is the same thing as a Pakka Adatia) into one of an ordinary broker. The appellants

1. (1915) 16 Bom. L. R. 716=39 Bom. 1.

accordingly asked that they should be allowed inspection of the plaintiffs ledger and to call for further evidence by cross-examining the plaintiffs witnesses to prove that the plaintiffs in their dealings with third parties were acting as principals and not as middlemen. The appellate court (Scott C. J and Heaton J) came to the conclusion that in the interests of justice and having regard to the facts brought to their notice further evidence should be taken in the case to prove that the plaintiffs in their dealings with third parties were acting as principals and not as middlemen, treating the Pakka broker exactly on the same footing as a Pakka Adatia.

The Court remarked "Now in these courts wagering contracts in produce take two forms : contracts in which there are two dealers, buyer and seller, generally brought together through the agency of some middleman, a broker, and contracts between an up-country constituent and what is known as a Pakka Adatia, in which, according to the ruling in *Bhagwandas v. Kanji*¹, there is not necessarily any contracting party beyond the up-country constituent on the one hand and the Pakka Adatia or commission agent on the other, for the Pakka Adatia is, for the purpose of the transaction, regarded as principal.

As a result of that decision, it has been held in *Burjorji v. Bhagwandas*² that it is sufficient if the knowledge that there is no intention of carrying out a contract on the part of up-country constituents of the Pakka Adatia goes no further than the Pakka Adatia, and it is not necessary to show anything more than the intention on the part of the Pakka Adatia also that the contract should not be carried out *in specie*.

With regard to the other class of contracts, of course it is necessary to show that there was no intention on the part either of the persons brought together by the middleman, so to carry out the contract."

On fresh evidence being recorded and on further hearing of the appeal it was held by the appeal court consisting of

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

2. (1915) 16 Bom. L. R. 716=39 Bom. 1.

Macleod C. J and Fawcett J reversing the decision of the trial judge (Beaman J).

(1) that the correspondence between the parties in which the plaintiffs frequently referred to satta dealings and the need of hedging as the market turned against the defendants, and the actual course of dealings between the parties, established beyond doubt that not only the plaintiffs knew that the defendants were gambling and not speculating but that there was a secret understanding that there was to be no actual delivery of cotton and that all transactions were to be adjusted by paying and receiving differences only ;

(2) that the evidence in the case further established that a similar understanding prevailed between the plaintiffs and third parties (with whom the plaintiffs dealt for the same Vaida and for amounts of produce corresponding with those for which the defendants entered into contracts) that the transactions between them should be closed either before or at the Vaida by the payment of differences only ;

(3) that if the plaintiffs were to be regarded as employed for labour, the evidence showed that the parties had entered into transactions knowingly to further or assist the entering into or carrying out agreements by way of wager within the meaning of Bombay Act III of 1865, inasmuch as the plaintiffs were in effect employed by the defendants to make bets on the rise and fall of the cotton market and the plaintiffs having that knowledge encouraged the defendants to give them orders for bets with the result that the plaintiffs made bets in consequence of those orders with the third parties who also knew that in their own transactions they were betting with the plaintiffs ;

(4) that the mere circumstance that the greater part of the plaintiffs claim related to differences resulting from cross-contracts did not make the contracts less the wagering transactions, for where the court found that when the contracts were entered into there was a secret understanding that only differences were to be paid and received it did not matter much if the parties before the Vaida agreed

to fix their losses or gains rather than wait till the Vaida. His Lordship the Chief Justice observed at p. 406 of the report: "Now, the chief difficulty in dealing with this appeal appears to me to arise from the fact that the proper issues were not raised, and that was due to the fact that although contests between Pakka Adatias and their constituents in these courts have been frequent, it does not seem to have been sufficiently realised that if the contract between the Pakka Adatia and his constituent is a contract of employment, such a contract can never by its very nature come within the definition of a wagering contract and the Pakka Adatia must win unless the constituent can bring the contract within the provisions of Bombay Act III of 1865. That test was present to the mind of the learned trial judge and was also referred to during the argument in *Bhagwandas Parashram v. Burjorji Ruttonji*¹, but unfortunately it does not appear that the respondents there were represented."

The learned chief justice then graphically described the transactions between the parties in the following terms at pp. 407 of the report. "The business between the plaintiffs and defendants was carried on by correspondence, the plaintiffs advising the defendants with regard to the state of the market, the defendants giving the plaintiffs orders to buy or sell. The commodity dealt in was mostly Broach but also Bengal and Akola cotton. Now, leaving all question of wagering aside for the present, when the defendants ordered the plaintiffs to buy, say 100 bales Broach cotton for the March Vaida, and the plaintiffs booked the order, that meant that the plaintiffs undertook to produce the cotton on the Vaida day and defendants undertook to pay for it. The plaintiffs might cover their own liability by entering into a forward contract with a seller, or they might prefer to take the risk themselves. Whatever course they pursued the defendants had nothing to do with any parties with whom the plaintiffs contracted. The plaintiffs only were liable to them. If that were the only transaction, when the Vaida

1. (1917) 20 Bom. L. R. 561 = 42 Bom. 373 = 45 I. A. 29.

day arrived, the defendants could either call upon the plaintiffs to deliver the cotton or settle at the room rate. If, however, before the Vaida day the defendants gave the plaintiffs an order to sell 100 bales then the business would be squared, the defendants would be debited with the cost of the purchase and credited with the proceeds of the sale. In the account of the suit dealings in Broach cotton at p. 202, it will be seen that the plaintiffs covered their own liability by entering into contracts with other parties, with the exception of 100 bales which were sold at the room rate at the Vaida. Not a single contract in the usual form was signed. The whole business from start to finish was transacted by book entry, the defendants being debited with the cost of purchases and credited with the price of sales. The plaintiffs would make nothing except their brokerage and the profit on the 100 bales settled at the room rate at the Vaida."

"Stopping there, if there was nothing more in the case, there would be no answer to the plaintiffs claim. They were employed to buy and sell cotton and if they incurred losses in the course of their following their employers instructions they were entitled to be indemnified. And if it be once realised that they guaranteed to find the cotton ordered by the defendants or to pay cash for the cotton sold, while the defendants had no concern whatever with the methods by which they arranged to fulfil their guarantee, then it would seem that in the absence of any evidence of witnesses, or of inferences which can be drawn from surrounding circumstances with regard to any understanding arrived at between the plaintiffs and defendants, it is absolutely irrelevant to enter into the question how the plaintiffs arranged to fulfil their guarantee."

As to the decision of the Privy Council in *Bhagwandas Parashram v. Burjorji Ruttonji Bomanji*¹ referred to above, his Lordship after setting out the facts of the case and after citing the passage in their Lordship's judgment at p. 378 beginning with the words "No doubt the contract of a Pakka

1. (1917) 42 Bom. 373=45 L. A. 29=22 Bom. L. R. 561.

Adatia, etc." cited above, said at pp. 423-425 of the report : "Now with the greatest respect I confess to having some difficulty in following that passage, taken in conjunction with the incidents of the employment of the plaintiffs as Pakka Adatias as set out in *Bhagwandas v. Kanji*¹. It was the plaintiffs who had undertaken to deliver to their thirty-nine buyers, there was no privity of contract between the defendant and those buyers, and though it seems that the defendant in form contracted to sell to the plaintiffs that was merely one way of noting down what the defendant had employed the plaintiffs to do. Nor do I understand how the employment of plaintiffs by defendant could be by way of wager, unless that expression can be extended to the employment of an agent to make a bet. But such a contract of employment cannot, it is submitted, come within the definition of a wagering contract. It seems as if their Lordships considered that there was only one set of transactions, for again the issue was whether the transactions on which the claim rested were agreements by way of wager; but whether the defendants were sellers to the thirty-nine buyers, the plaintiffs also being liable to the buyers, or whether the plaintiffs only were to be considered as the sellers is by no means clear. The question whether the contract of employment of a Pakka Adatia could be vitiated under Bombay Act III of 1865 was nowhere discussed. However that may be, the facts of this case bear no resemblance to the facts in *Bhagwandas Parashram v. Burjorji Rattonji Bomanji*².

The plaintiffs there had entered into written contracts with thirty-nine buyers, and there was no evidence that as between the plaintiffs and those buyers there was a common intention to wager. Nor were their Lordships satisfied that as between the plaintiffs and the defendant there was an understanding that everything was to be settled by payment of differences. Here all the evidence points to an undertaking not only between the plaintiffs and defendants but also

1. (1905) 7 Bom. L. R. 611=30 Bom. 205. 2. (1917) 45 I. A. 29=42 Bom 373=22 Bom. L. R. 561.

between the plaintiffs and the persons with whom they dealt that all transactions should be closed either before or at the Vaida by payment of differences. The evidence also shows that the defendants in effect employed the plaintiffs to make bets on the rise and fall of the cotton market, that the plaintiffs knew that and encouraged the defendants to give them orders for making bets and that the plaintiffs made bets in consequence of those orders with third parties who also knew that they were betting with the plaintiffs. Apart from that, if A employs B to make a bet and B for his own convenience enters into a contract with a third party which can be enforced, that does not in any way get rid of the fact that A was betting, that B knew that he was betting and agreed to assist him in attaining his object. I cannot conceive any jury even if they happened to be gifted with only an ordinary amount of common sense, coming to any other conclusion than that all the transactions recorded in the case were wagering, pure and simple, and it really makes no difference whether the defendants were buying cotton from and selling cotton to the plaintiffs direct, or employed them to buy and sell on their behalf. There never was the slightest intention to deliver a single bale and all the transactions were to be adjusted by paying and receiving differences."

Referring to the contention of the plaintiffs that the greater part of the plaintiffs' claim related to differences resulting from cross-contracts; and, therefore, could not be based on wagering contracts, His Lordship said "Now if A orders B to buy 100 bales cotton at the market rate for a future Vaida and the Court is of opinion that when the contract is entered into there is a secret understanding that only differences are to be paid and received, that is to say, that if the market rate at the Vaida is higher B pays A the difference, and if the market rate is lower A pays B the difference, it does not seem to matter much if the parties before the Vaida agree to fix their losses or gains rather than wait until the Vaida. It depends entirely on whether the original contract is held to be a wager or not. Apart from

that, according to the decision in *Bhagwandas v. Kanji*¹ the Adatia is under no obligation to make a cross-contract."

Referring to the remarks of Beaman J in the Lower Court at the conclusion of his judgment already cited before the Learned Chief Justice remarked at p. 418 of the report : "Those remarks were based on the decision that the plaintiffs were middlemen and that the actual contracting parties were the defendants on the one hand and the parties with whom the plaintiffs entered into contracts at the defendants instructions on the other. But as the plaintiffs are now admitted to have occupied the same position as Pakka Adatias, we must consider the evidence which was before Beaman J and the evidence since recorded from an entirely different point of view. There is no need why we should be deceived by the pious protests of the plaintiffs, if from a survey of the surrounding circumstances we must come to the inevitable conclusion that the plaintiffs were the centre of a series of of gambling transactions, and that there must have been an understanding well-known to all concerned on all the four points which I have set out above. First the defendants were traders in the Berars. Can it possibly be suggested that the plaintiffs ever imagined that the defendants wanted Broach cotton sent to them or that they would have Broach cotton to deliver? Mr. Justice Fawcett referring to the learned Judges remarks in the court below that the evidence showing that to the plaintiff's knowledge defendants never meant real business, "has no bearing whatever upon the other half of the contract, that is to say, the intentions of those who were selling against the defendants buying orders," said : "This is no doubt correct if the plaintiffs were mere middlemen, as the lower Court treated them ; but it is now common ground that they were on the same footing as Pakka Adatias, who as regards his up-country constituent is a principal and not a disinterested middleman bringing two principals together, and consequently this view falls to the ground."

Mr. Justice Fawcett in his judgment in the said case referring to the question of wager observed at pp. 426-427 of

1. (1905) 7 Bom. L. R. 611=30 Bom. 205.

the report: "I do not agree with the learned Advocate General that the fact of the plaintiffs making themselves liable in the Bombay Market is conclusive against the plea of wager or furthering wagering transactions. Nor do I read the judgment in *Bhagwandas Parashram v. Burjorji Ruttonji Bomanji*¹ as laying down any such proposition." In the paragraph at p. 378 beginning: "Under the sales to thirty-nine buyers" the matter is dealt with as an indication that the adatias had no common intention to wager: but the question still remains whether the contracts in respect of which the plaintiffs sue, were not knowingly made to further or assist the entering into agreements by defendants, by way of gaming or wagering, within the meaning of Bombay Act III of 1865. And even as regards a common intention to wager, it seems to be a question purely of probabilities."

In this connection the unreported decision of the Appeal Court consisting of Shah A. C. J and Fawcett J. in the case of *Hurnandrai Fulchand a firm v. Kanaiyalal son of Purnamal*,² may also be referred to. This was a suit filed by the plaintiffs appellants against the defendant respondent to recover certain losses and damages in respect of the defendant's forward transactions in cotton. The defendant pleaded that the transactions were wagering. The lower Court (Marten J) dismissed the plaintiffs suit on the ground that the transactions were wagering, as the learned judge held that there was a secret and tacit understanding between the plaintiffs and the defendant that there was to be no delivery in respect of the transactions and that the parties were to deal in differences only. The learned judge came to this conclusion as he was satisfied as to the defendant's poverty and complete lack of means to be able to enter into transactions of the magnitude and extent as the transactions in the case disclosed and as to the plaintiffs' knowledge of the defendant's condition. As against the defendant's contention as to wager, the plaintiffs inter alia contended that in

1. (1917) 45 Bom. 373=45 I. A. 29= 2. Appeal No. 23 of 1924 suit No.
20 Bom. L. R. 561. 3348 of 1920 unreported judgment dated 15-7-1924.

fact in respect of most of the transactions entered into between them and the defendant they had entered into corresponding transactions with another person one N. N. and that they had in fact covered the contracts in suit with contracts between them and the said N. N. It was further urged by the plaintiffs that they had in fact given and taken delivery in respect of these transactions and that under the circumstances there was no common intention between the defendant and the plaintiffs to deal in differences only. Various accounts in respect of the transactions in suit between the plaintiffs and the defendant and also between the plaintiffs and N. N. were put in and the said accounts were not disputed. Shah A. C. J referred to the case of *Manilal v. Radhakisson*¹ referred to above but observed : "that each case depended on its own facts and that it was not possible to derive any assistance from general observations in other cases and that it was not a safe process to adopt to attempt to compare the evidence in one case with the evidence in the other." Referring to the plaintiffs' corresponding transactions with third parties, the learned judge remarked in his judgment : "there is the further fact which is very important, namely, that in respect of most of these transactions (i.e. the transactions in question in this suit) the plaintiffs entered into corresponding transactions with third parties and Ex. K which contains the various entries with reference to these transactions in which delivery orders were given and taken shows prima facie at any rate that the plaintiffs entered into corresponding transactions which were not in the nature of wagers with third parties. I do not think such entries are conclusive against the theory that the transactions between the plaintiffs and the third parties may have been in the nature of wagering but where the accounts are not challenged and where the defendant himself is not in a position to suggest anything against the face value of the transactions, which are proved in a manner in which they have been proved in this case, it is a circumstance to my mind which

1. (1920) 45 Bom. 386=22 Bom. L. R. 1018.

could and should weigh in favour of the plaintiffs' theory that the transactions between themselves and the defendant could not be wagering transactions but real transactions. These transactions with the third parties have been proved and except in one case all the other contracts of sale and purchase between the present parties were covered with contracts with third parties. If accept the view that these transactions were in the nature of wagers, it seems to be difficult to ignore this circumstance in determining the question of fact in this case, whether the common intention between the plaintiffs and the defendant was to deal in differences only. To that circumstance, it seems, the learned judge has not given that weight which in my opinion, it is entitled to." It may be noted here that Fawcett J., who was a party to the decision in *Manilal v. Radhakissen*¹ referred to above also fully endorsed the view taken by Shah A. C. J with reference to the converging transactions of the plaintiffs with the third parties. His Lordship in his judgment observed in this connection: "I admit I have felt some hesitation on the question of differing from the view taken by the learned Judge below, because the circumstances do undoubtedly create at any rate suspicion that there was a common intention only to pay differences. But of course mere suspicion is not enough. The question is whether the defendant has discharged the onus of proof that lies upon him. After briefly referring to the defendant's testimony the learned judge continued, "as regards the circumstantial evidence this case seems to be really weaker than the one which arose in the leading case of *Bhagwandas v. Burjorji*² where the Privy Council upset the decision of this court that the transactions between the defendant Burjorji in that case plaintiff and the who were Pakka Adatias were of a wagering nature. That case has some similarities with the present one; and although I quite agree with the learned Chief Justice that it is dangerous to compare the evidence in one case with the

1. (1920) 45 Bom. 386=22 Bom. L. R. 1018. 2. (1917) 42 Bom. 373=20 Bom. L. R. 561=45 I. A. 29.

evidence in another, yet inasmuch as this decision of the Privy Council is the leading authority we have for our guidance, I think it is of some help to see how far the present case compares with the one where their Lordships held that the onus of proof had not been discharged by the defendant. In that case, as in this, the defendant had no regular business, he was merely speculating in order to try to get some money. And as in this case, so in that, the defendant had no regular means. The only difference in their position is, that the defendant in the Privy Council case had had the luck to win a sweep, which gave him a certain amount of money. As is the case here, the plaintiff in the Privy Council case had entered into transactions with third parties of a *bona fide* nature. This High Court in its judgment reported in 38 Bom. 204, 218 held that those transactions with third parties were not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant and that there were other circumstances which showed that really in those transactions, there was a common intention that delivery should not be called for. No indication of the latter kind exists in the present case and this is therefore a stronger one in favour of the plaintiffs than was the case, which the Privy Council had under consideration. The Privy Council considered these third party transactions went against the theory of a common intention to gamble and I think in the present case due weight must be given to the same consideration. There is no correspondence or other evidence showing this common intention clearly. I agree therefore in holding that the common intention set up by the defendant has not been established". The Appeal Court as a result decreed the plaintiffs claim and held the transactions not to be wagering.

The same learned judge Shah A. C. J seems, however, to have taken a different view and to have endorsed the dictum of the Appeal Court in *Manilal v. Radhakissen*¹, in the case of *Mukundchand Balia v. Sobhagmal Gianmal*², a

1. (1920) 45 Bom. 386=22 Bom. L. R. 1018.
2. (1924) 26 Bom. L. R. 1097, 1104.

case of Katchi Adat transactions where his Lordship observed: "In *Manilal Raghunath v. Radhakison Ramjivan*,¹ the two questions which may arise for consideration in a case of that character have been stated by the learned Chief Justice. With reference to the first question, namely, if the contract between the parties was one of employment for reward was it knowingly made to further or assist the entering into of agreements by way of gambling or wagering," the learned Chief Justice proceeds to point out what the defendant would have to prove in order to succeed on that issue ; and among the four points stated the last one shows that, even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. That situation could arise in the case of a Pakka Adatia because as between the Pakka Adatia and the up-country constituent both are principals with reference to the contract, and it does not matter in the least as to whether the Pakka Adatia has entered into other contracts with third parties to cover the contracts or not. It is entirely a matter of his discretion and choice to enter into contracts with third parties, but the contract between the Pakka Adatia and the up-country constituent is complete."

On the question of wager, the case of *Harnarayan Jodhraj v. Radhakisan Chandrabhan*² decided by Kotwal A. J. C. might as well be referred to. In this case the defendant employed the plaintiffs as his Pakka Adatias and the plaintiffs sued to recover the amount due to them in respect of the transactions entered into by them on the defendant's behalf as such Pakka Adatias. The defence was that the transactions in suit were wagering. It was held that the transactions were wagering. Referring to the plaintiffs contention that they being merely agents if they paid up losses on defendant's behalf they were entitled to recover the amount paid from the defendant, the learned Judge said that the relationship between Pakka Adatias and their constituents was not one of principal and agent, but

1. (1920) 22 Bom. L. R. 1018.

2. A. I. R. (1923) Nag. 324.

that of principal and principal and that the plaintiff was not entitled to recover anything from the defendants. Again in *Devshi Harpal v. Bhikamchand*,¹ Madgavkar J following the decision of Macleod C. J. in *Manilal v. Radhakissen*² held that the transactions of a Pakka Adatia could be wagering though it is true that His Lordship has not discussed the question. His Lordship observed in his judgment in this connection.

"The last question of fact is the question of wager and it must depend upon the circumstances of each case. It is true, as it is contended for plaintiff that a certain amount of gold 50 tolas was purchased and was sent. Reading the correspondence as a whole, it refers in several places to Teji Mandi and Budla and in the absence of any evidence that the plaintiffs were really dealers in cotton or that the defendant No. 1 was so, there is no doubt left in my mind that the other transactions including the present transaction, apart from the 50 tolas of gold purchased, were all Vaida transactions and were all intended to be settled by the parties, not by way of delivery but by way of differences. It follows that on the facts of the present case, this case is one not like *Bhagwandas v. Burjorji*³, but rather within the category of cases such as *Manilal v. Radhakissen*⁴ where even against a Pakka Adatia, it was held that the transactions were Sutta and by way of wager."

In the Court of Appeal⁵ Marten C. J. delivering the judgment of the court said that it was unnecessary to decide the question and observed that he did not think that a common intention to wager was proved on the facts of the case. His Lordship's observations on the decision in *Manilal v. Radhakissen*⁴ are very important and pertinent on the question under consideration and may well be cited with advantage as his Lordship thinks that the transactions may

1. (1920) 45 Bom. 386=22 Bom. L. R. 1018.
2. Suit No. 5785 of 1922 unreported judgment dated 10th March 1926.
3. (1917) 42 Bom. 373=20 Bom. L. R. 561=45 I. A. 29.
4. (1920) 45 Bom. 386=22 Bom. L. R. 1018.
5. (1926) 29 Bom. L. R. 147, 151.

not be wagering in spite of the fact that the existence of genuine transactions with third parties is not established as it was not in fact established before their Lordships.

His Lordship observed at p. 151 of the report :

"In that view of the case it is unnecessary to decide whether the transaction was a wagering one. But if contrary to the view which I take the plaintiff ought still to be allowed to lead further evidence to prove the market rate on the material dates, I should, with all respect to the learned judge, be unable to agree with his finding on the question of wagering, as I do not think that on the facts of this case we should hold it proved that there was a common intention to wager. The difficulties in establishing a defence of wager are set out in the judgment of Sir Norman Macleod in *Manilal Raghunath v. Radhakisson Ramjiwan*¹. And although the Court in that particular case was able to inter from the surrounding circumstances that the transactions were wagering ones, they are insufficient, in my opinion, in the present case, to enable the Court so to do. It is true that the plaintiffs have not satisfactorily established the existence of genuine contracts with third parties as in *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji*² and *Sobhagmal v. Mukundchand*³ But speaking for myself, I see little to distinguish the present transaction from a common type of business dealing between a Pakka Adatia in Bombay and his up-country constituent. It may be speculative but it does not follow that it was a wagering contract in the eyes of the law."

It is submitted that the view taken by his Lordship is the right and reasonable one, as almost all forward transactions are speculative, though they are not necessarily wagering as pointed out by their Lordships of the Privy Council in *Bhagwandas v. Burjorji*² followed by Macleod C.J in *Manilal v. Radhakisson*¹ in this respect. To prove wager it is necessary in every case to show a common intention, a

1. (1920) 45 Bom. 386=22 Bom. L. R. 1018.

20 Bom. L. R. 561.

2. (1917) 42 Bom. 373=45 I. A. 29=

3. (1926) 51 Bom. 1=(1926) 28 Bom. L. R. 1376 P. C.

thing which might be disproved by all sorts of evidence and circumstances including the existence of genuine transactions with third parties, an important though not conclusive circumstance indeed.

In the recent Calcutta case, viz. *Karunakumar Datta Gupta v. Lankaran Patwari*,¹ Ameer Ali J had occasion to consider the following cases on the Pakki Adat system, viz., *Bhagwandas Narottandas v. Kanji Deoji*,² *Burjorji v. Bhagwandas*³ and *Manilal v. Radhakisson*.⁴ His Lordship shared the difficulty felt by Macleod C. J in *Manilal v. Radhakisson*⁴ in discovering what legal principals were intended to be laid down by their Lordships of the Privy Council in *Bhagwandas v. Burjorji*⁵ except for the finding that the common intention to wager was in fact absent. His Lordship said that so far as matters of principales were concerned, *Manilal v. Radhakisson*⁴ was the authority which he proposed to follow and which he did. It may be pointed out here that this case has no bearing whatever on the question of wager in the Pakki Adat system of transactions as this was not a Pakki Adat case but a case in which the system of transactions was entirely different from the Pakki Adat system.

In the latest case on the subject from the Sind Court, viz., *Raghunath & Ors. v. Rampratab Ramchandra*⁶ decided by Ferrers J. C. and O'Sullivan J C the question of wager in the Pakki Adat system of transactions was considered. This was a suit by the plaintiffs to recover a sum of about Rs. 4000 with costs and interest representing loss alleged to be resulting from forward contracts said to have been entered into by the plaintiffs as Pakka Adatias on behalf of the defendants who it was alleged were doing a joint family business. The defendants denied that the plaintiffs acted as their Pakka Adatias and pleaded that the transactions were

1. (1933) 60 Cal. 856, 874-878.

2. (1903) 7 Bom. L. R. 611=30 Bom. 205.

3. (1913) 38 Bom. 204, 217-218=15 Bom. L. R. 716.

4. (1920) 45 Bom. 386=22 Bom. L. R. 1018.

5. (1917) 42 Bom. 373=45 I. A. 29=20 Bom. L. R. 561.

6. A. I. R. (1935) Sind.38=160 I. C. 6.

by way of wager. The Lower Court did not decide whether the contracts were by way of wager nor did it decide what was actually the relationship between the plaintiffs and the defendants. The Court of appeal decided that the relationship between the plaintiffs and defendants was not that of Pakki Adat but that of ordinary principal and agent. Referring to the question of wager the court said :—

“In *Chandulal v. Sidhruthrai*¹ the contract in terms was indential with the one in this case and Starling J held it to be of the nature of a wager and dismissed the suit. Since then it has been held in two decisions of the Bombay High Court that a transaction between the Pakka Adatia and his constituent may be by way of wager and the existence of the Pakki Adat relationship does not by itself negative a possibility of a contract being a wagering contract. The principle was subsequently affirmed by the Privy Council³”.

From the authorities cited above, it will be seen that the decision of the question of wager or no wager in this system of transactions depends chiefly on the relationship between the Pakka Adatia and his constituent. It has been seen that judicial opinion is unanimous, without exception, that if the relationship is taken to be that of principal and agent as it was held, in the earlier decisions as also even in *Manilal v. Radhakissen*² the transactions between them could never be vitiated as wagering and gambling and no defence of wager could ever be logically set up by the constituent against his Pakka Adatia in a suit by the latter against the former, unless the transactions could be brought within the purview of the Bombay Gambling Act III of 1865. If the relationship is that of buyer and seller, the question arises whether the genuineness of the transactions of the Pakka Adatia by way of cover with third parties in Bombay in pursuance of his constituent's orders are admissible in evidence as showing a

1. (1905) 7 Bom. L. R. 165=29 Bom.
291.

Bom. 386.

2. (1920) 22 Bom. L. R. 1018=45

3. (1917) 42 Bom. 373=20 Bom. L.
R. 561=45 I. A. 29.

sufficient indication of the intention of the Pakka Adatia to do genuine and not wagering business also with his own constituent. It would appear from the decision of the Appeal Court in *Manilal v. Radhakisson*¹ that in the opinion of the Appeal Court the relationship between the Pakka Adatia and his constituent is that of vendor and purchaser and not of principal and agent and that consequently "there is" to use the words of Macleod C. J. "a distinct dividing line between the covering transactions entered into by the Pakka Adatia with third parties in Bombay on the one hand and the transactions between him and the constituent on the other hand" so that the existence and the genuineness of the latter in the opinion of the Appeal Court afford no such indication whatever. It must have been seen, however, that there is a conflict of judicial opinion on the subject and it cannot be said that the law on the question has yet been finally settled, for Shah J in the cases of *Motichand Magandas v. Keshav Appaji*² and *Harnandrai Fulchand v. Kanaiyalal Puranmal*³ (1) has held that in determining the common intention of the two contracting parties, viz., the Pakka Adatia and his constituent, the court ought to take into account as a piece of evidence (and as a piece of evidence only) the circumstance that the Pakka Adatia has entered into contracts with third parties which are not wagering contracts to cover his contract with his constituent and that if the Pakka Adatia's contracts with the third parties represent genuine business transactions and not wagers, it may be said (undoubtedly with some force) that he had a similar intention in entering into contracts with his own constituent, but the same learned Judge took a different view in *Mukunchand v. Sobhagmal*,⁴ a Katchi Adat case and observed: "that it does not matter in the least whether the Pakka Adatia had entered into contracts with third parties to cover the contracts or not as the contract between him and the constituent is complete." The

1. (1920) 22 Bom. L. R. 1018=45 Bom. 386.

2. (1920) 22 Bom. L. R. 406.

3. Appeal No. 23 of 1924, Suit No. 3348 of 1920.

4. (1924) 26 Bom. L. R. 1097.

decision of Shah A. C. J in the unreported case of *Hurnandrai Fulchand v. Kanayalal*¹ was given by him sitting in appeal with Fawcett J who was a party to the decision in *Manilal v. Radhakisson*² with Macleod C. J in appeal, and he Fawcett J was fully aware of the law laid down in *Manilal v. Radhakisson*². All these judgments are of the Court of Appeal and are conflicting, though the decision of Shah A. C. J and Fawcett J in the unreported case of *Hurnandrai Fulchand v. Kanayalal*¹ being a later decision on the subject and being directly in point may be considered to be a decision of weight and authority, as one which was given in spite of the decision in *Manilal v. Radhakisson*² which was distinguished by Shah A. C. J who referring to the said case observed "that each case depended on its own facts and that it was not possible to derive any assistance from general observations in other cases and that it was not a safe process to adopt to attempt to compare the evidence in one case with the evidence in the other." The opinion expressed by Shah A. C. J in *Mukunchand v. Sobhagmal*³ is directly contrary to his decisions in the two earlier cases and it is submitted that it is merely an *obiter dictum* as the point was not directly before the learned judge for decision. The decision of Macleod C. J. in *Manilal v. Radhakisson*² was not followed by Marten C. J and Crump J in *Devshi v. Bhikamchand*⁴ in which his Lordship Marten C. J said that though the decision in that case may have been right having regard to the facts of the particular case, the facts in the case before him were insufficient to establish the defence of wager even though the plaintiffs had been unable to prove the existence of genuine transactions with third parties. It will thus be seen that this decision goes a step further.

This decision of Marten C. J and Crump J in *Devshi v. Bhikamchand*⁴ also shows that in the converse case, that is, in the case where the Pakka Adatia has not entered into

1. Appeal No. 23 of 1924, Suit No. 3348 of 1923.

Bom. 386.

3. (1924) 26 Bom. L. R. 1097.

2. (1920) 22 Bom. L. R. 1018=45

4. (1927) 29 Bom. L. R. 147.

any covering transactions with third parties in Bombay, it does not necessarily follow that his transactions with his own constituent are wagering, for that is a question to be determined by the other evidence in each case.

In conclusion in the present confused state of the authorities as the reader must have observed it is submitted that it is wrong to shut out the evidence of the transactions which the Pakka Adatia enters into with third parties in Bombay in pursuance of his constituent's orders on the question of the decision of the genuineness of the transactions between himself and his constituent. Of course it is true that the existence of the Pakki Adat relationship would not and does not necessarily negative the possibility of the transactions being wagers between the Pakka Adatia and his constituent, but the genuineness of the transactions of the Pakka Adatia with the Bombay parties is undoubtedly a circumstance which must be taken into account for the decision of the question of wager between himself and his constituent, as they are some though not a conclusive index of the intention of the Pakka Adatia with regard to the transactions between himself and his constituent, as under the law as it stands to-day, it is the common intention of the contracting parties which is to be taken into account for the purpose of the decision of the question of wager whether in the Pakki Adatia system of transactions or otherwise.

CHAPTER XI.

DIFFERENCE BETWEEN A PAKKA BROKER AND A PAKKA ADATIA.

"THE only difference between the relationship of a Pakka Adatia and his constituent on the one hand and that of a broker personally liable on the contracts he enters into on orders received and his client on the other, is that in the latter case the broker enters into the contract as agent for the client, he himself also being personally liable to the person with whom he contracts, while the Adatia does not make the contracts with the third parties as agent, but as a principal, the constituent having no right to be brought into contact with the third parties." Per Macleod C. J in *Manilal v. Radhakisson*¹

1. (1920) 45 Bom. 386, 413=22 Bom. L. R. 1018, 1029.

CHAPTER XII.

THE PROPER ISSUES AND THE NECESSARY PROOFS FOR THE SAME.

THE proper issues in a suit by a Pakka Adatia against his constituent when the defence of water is raised are :—(1) if the contract between the parties is one of employment for reward, is it knowingly made to further or assist the entering of agreements by way of gaming or wagering ? (2) If the contract between the parties is as between principal and principal, is it by way of wagering or gaming ?

In order to win on the first issue the defendants must prove that there was an understanding between them and plaintiffs :—(1) that they were not only speculating but gambling, (2) that if they ordered the plaintiffs to buy cotton, they would never call upon them, to deliver it, and if they ordered them to sell, they would never themselves deliver it, (3) that if the plaintiffs incurred losses in carrying out their orders, they could indemnify them and (4) that even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. Incidentally it might be arranged that plaintiffs should only enter into wagering contracts with third parties, and that would be sufficient to vitiate the contract of employment, though it might not be possible to prove that those third parties with whom the plaintiffs contracted were also wagering. On the second issue the defendants would have to prove there was a common intention only to pay differences. It is quite hopeless to expect to get any direct evidence from the plaintiffs' side as no witness of theirs will ever admit that there are such dealings as wagering contracts. They may plead guilty to a knowledge that there are such things as satta transactions which are merely speculative and are or can be so mixed up with genuine transactions that they gain inevitable validity from such transactions. Per Macleod C. J in *Manilal v. Radhakisson*.¹

1. (1920) 45 Bom. 386, 416, 417=22 Bom. L. R. 1018, 1031, 1032.

CHAPTER XIII.

PAKKI ADAT SYSTEM-CUSTOM-BURDEN OF PROOF-
CONFLICT BETWEEN PAKKA ADATIA'S
DUTY AND INTEREST.

IN a recent case from the Sind Court¹, Ferrers J. C. said :
“ Now the words Pakki Adat have no magical efficacy in themselves. They are no more than a compendious description of a body of local usages which vary from market to market. The Pakki Adat system which under the name is prevalent in Bombay has been held to involve a material departure from the ordinary relations of principal and agent see *Chandulal v. Siddhatrai*.²

It is clearly necessary that anybody setting up such a local usage must allege and prove the incidents of that usage. In *Chandulal v. Siddhatrai*² there was no suggestion of the alleged usage in the pleadings or in the issues nor was there any evidence which proved that the parties alleging such usage failed because of the absence of the necessary evidence. In the following year a similar suit was brought by other litigants who as it happened were represented by the same learned counsel. Warned by what had happened in the previous case the plaintiff now came prepared with an ample mass of evidence to establish the usage which he set up. *Bhagwandas v. Kanji*³.

Anybody setting up a local usage must allege and prove the incidents of that usage. And further that these incidents were brought to the knowledge of the upcountry constituent with whom the Pakka Adatia is dealing ; where the usage of Pakki Adat is alleged, the courts will require strict proof of it. The evidence of one man and that too the gumastha of the plaintiffs does not fulfil the requirements necessary in order to establish the existence and legal validity of a custom admitted to be at variance with the ordinary law of principal and agent.”

1. *Raghunath v. Rampratab Ramchandra* A. I. R. (1935), Sind 38 = 160 I. C. 6. R. 165.
2. (1905) 30 Bom. 205 = 7 Bom. L. R. 611.
3. (1905) 29 Bom. 291 = 7 Bom. L.

The Pakki Adat system of transactions has now been well established in Bombay as a legitimate mode of commercial dealing ever since the decision of Chandavarkar J in *Kanji v. Bhagwandas*¹. His Lordship held in that case that there was no conflict between the Pakka Adatia's duty and interest and that the said custom was not unreasonable and this opinion of the learned Judge was upheld by Jenkins C. J on appeal² where the learned Chief Justice delivering the judgment of the court said: "Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score." The same learned Judge reiterated his opinion in *Bhagwandas v. Bujrorji*³ in the Privy Council⁴ where his Lordship delivering the judgment of the Board observed "that Pakki Adat dealings were well established as a legitimate mode of conducting commercial business in the Bombay market". But though the Pakki Adat business is very well known in the Bombay market it does not seem to be so very prevalent in other parts of India. In Bombay before the decision of Chandavarkar J¹ upheld on appeal by Jenkins C. J and Batty J as pointed out before,² the said custom though alleged in *Chandulal v. Sidhruthrai*⁴ was not accepted by the court of appeal in the said case, even though the appeal came on for hearing after the decision of Chandavarkar J in *Kanji v. Bhagwandas*¹. The learned chief justice pointed out that the usage proved before Chandavarkar J involved a material departure from the ordinary relations between a principal and his agent and distinguished the case on the ground that the learned Judge's view in its favour was based on evidence adduced before him for the purposes of that case and that there being no suggestion of the usage in the pleadings or the issues nor any evidence which proved it, he refused to accept the finding in *Kanji v. Bhagwandas*¹ as establishing a usage of which they in the said case

1. (1905) 7 Bom. L. R. 57.

2. (1905) 7 Bom. L. R. 611=30 Bom. 205.

3. (1917) 20 Bom. L. R. 561=42

Bom. 373=45 I. A. 29 P. C.

4. (1905) 29 Bom. 291=7 Bom. L. R. 165.

ought to take judicial notice. But the said custom held as proved by Chandavarkar J in *Kanji v. Bhagwandas*¹ was accepted as established on appeal in the case of *Bhagwandas v. Kanji*² by the Court of Appeal only a short time after the delivery of the judgment in *Chandulal v. Siddhathrai*.³ Their Lordships observed."

"The documentary evidence in the case taken alone points to the relation of principal and commission agent, as was held in a similar case of *Chandulal v. Sidhruthrai*.³ But here we have what was absent there, a large body of evidence called to show that the relations between the parties were governed by the usage of the Bombay market known as the Pakki Adat system which it is alleged, allowed of the plaintiffs dealing with the December contracts in the way they did without prejudicing their claims against the defendant. It accordingly is necessary to examine this evidence and to see what it proves."

In a recent Lahore case⁴ it was contended that Pakki Adat dealings involved a conflict between the Pakka Adatia's duty and interest and that the custom even if proved was unreasonable, but the said contention was overruled by Bhide and Currie JJ who held following the decision in *Bhagwandas v. Kanji*² on the evidence before them that the usage was well known at Shamli a place in the Punjab and added "that the contracts were neither illegal nor immoral nor opposed to public policy and were not void under S. 23 of the Contract Act" and further "that it was for the parties to decide on what terms contracts should be entered into and if they choose to enter into contracts with full knowledge of the commercial usage governing them, there was no reason why they should not be held to be bound thereby even if the usage does involve some conflict between the agent's duty and interest".

1. (1905) 7 Bom. L. R. 57.

165.

2. (1905) 30 Bom. 205=7 Bom. L. R. 611.

4. *Jotram Shersingh v. Jewanram Sheotimal* A. I. R. (1932) Lah.

3. (1905) 29 Bom. 291=7 Bom. L. R.

633=33 Punj., L. R. 985.

SUMMARY.

The principles of law underlying the Pakki Adat System of transactions may now be summarised as follows :

1. That the relationship between the constituent and the Pakka Adatia is held to be that of principal and principal and not that of principal and agent, whether the contract is written or oral or whether an order is sent by telegram and accepted by the Pakka Adatia.
2. Though the relationship between the constituent and the Pakka Adatia has been held to be that of principal and principal for practical purposes, it must be noted that the Pakka Adatia is also an agent with certain rights given to him for considerations mentioned in Chapter III.
3. That no privity of contract is ever established between the constituent and the Bombay merchant with whom the Pakka Adatia enters into contracts in pursuance of his constituents orders. Nor is there any obligation on the part of the Pakka Adatia to find buyers or sellers. As between the constituent and the Pakka Adatia, the business is finished when an order for sale or purchase is accepted, such acceptance being apparently effected by an entry in the Soda Nondh.
4. The Pakka Adatia guarantees the performance of the contracts, that is, becomes personally responsible for the performance thereof to his own principal, the constituent, whether up-country or local. He also guarantees the performance of the contracts to the Bombay merchant with whom he transacts business pursuant to the orders of his constituent. It is only the order of the constituent which the Pakka Adatia puts through either by appropriating it to himself or by entering into a contract in the market by way of cover.
5. Both the constituent and the Bombay merchant look and must necessarily look to the Pakka Adatia alone for the performance of the contracts. His obligations are to

find cash or money for goods or goods for cash or money or to settle and pay the differences on the due date.

6. The Pakka Adatia is not the disinterested broker ; he is a party to the contract and fully interested therein not only for the sake of the payment of his commission and brokerage in addition to the price of the goods, but also for the fulfilment of the contracts both to his own principal the constituent and the Bombay merchant. If the constituent sends goods for the due date, the Pakka Adatia is responsible for the price whether he has covered himself or not.

7. The Pakka Adatia is entitled to substitute his own contract in fulfilment of an order from his up-country constituent so as to constitute himself the buyer or the seller as the case may be in respect of the said order.

8. The Pakka Adatia is also entitled to enter into a cross contract with another constituent in fulfilment of an order from the first constituent, that is, if A the constituent sends an order to the Pakka Adatia for sale and B another constituent sends an order to him for purchase, the Pakka Adatia can cross the two contracts.

9. The constituent on whose behalf the Pakka Adatia acts is not in the least concerned with the method or the manner, in which, the Pakka Adatia carries out his orders. That is a matter fully and solely within the discretion of the Pakka Adatia nor is the constituent entitled to claim as of right the benefit of any covering contracts entered into on the same day by the Pakka Adatia.

10. The Pakka Adatia is not obliged to carry out an order of his constituent ; all that he is bound to do is to inform him at once of his inability to carry out the order so as to enable him, the constituent, to put through his order through some other Pakka Adatia.

11. The Pakka Adatia is under no obligation to substitute a fresh contract to meet the order of his constituent, nor is he bound, having accepted a selling order from a client for a particular Vaida to accept a cross buying order for the same client, or vice versa.

12. The constituent whether up-country or local is not entitled to call upon the Pakka Adatia to disclose to him the name of the Bombay merchant with whom the Pakka Adatia enters into contracts in pursuance of his constituent's orders. Nor is the Bombay merchant entitled to know the name of the party on whose behalf, and for whom, the Pakka Adatia is acting. The reason is that there is no necessity for the constituent to know the name of the Bombay merchant with whom the Pakka Adatia contracts pursuant to his orders nor is it necessary for the Bombay merchant with whom the Pakka Adatia so contracts to know the name of the constituent as both look to the Pakka Adatia alone for the performance of the contract.

13. The Pakka Adatia is not entitled to interest from his constituent upon the amount which he claims as ordinary damages for breach of contract.

14. When a Pakka Adatia enters into transactions for a certain Vaida and the transactions are closed before the due date of the Vaida, the starting point for limitation is not the date on which the transactions are closed, but the due date of the Vaida.

15. The Pakka Adatia is paid a higher commission generally eight annas. The reason is that he makes himself personally responsible, in other words, he undertakes or guarantees the performance of the contracts, that is, undertakes to find goods for cash or cash for goods and this is by virtue of the custom relating to the Pakki Adat system of transactions. Another reason why he is paid his commission is that the constituent cannot do this business without him.

16. The Pakka Adatia is entitled to demand margin from his constituent if the rise or fall in the market justifies the demand. But the onus lies on him to show the necessity for the reasonable exercise of his powers, even where the contract between them purports to give an absolute discretion as to calling for and demanding margin. If the demand for margin is not met, he is entitled to close the contract and to sue his constituent for recovery of the loss suffered by

him by reason of such default and give to the seller or buyer notice of his intention to do so.

17. The Pakka Adatia's liability does not go to the extent of making him liable to the principal, the constituent, where there can be no profit by reason of any stringency in the market or for any other reason for the matter of that.

18. The Pakka Adatia guarantees that the prices at which he carries out the constituent's buying or selling orders are the current prices on the date on which such orders are carried out.

19. The constituent has to bear the loss or take the benefit of Exchange and the Pakka Adatia is entitled to debit the same to him.

20. The Pakka Adatia is entitled to debit to the constituent interest on the amount due to him and also the costs and charges for remittances whether sent by hundi or by railway according to the prevailing custom.

21. The Pakka Adatia, if he deliberately refuses or neglects to buy or sell according to his constituent's orders though he could have carried out the order, would be liable not only for the performance of the contract but also for damages.

22. The constituent is entitled as a matter of right to file a suit against the Pakka Adatia for an account of the agency transactions.

THE LAW OF THE KATCHI ADAT SYSTEM.

BOOK II.

THE KATCHA ADATIA.

INTRODUCTORY.

THE Katcha and Pakka Adatias are creatures of custom and as legal entities were first brought into legal existence and legally recognised, the former, by the decision of Chandavarkar J, in *Fakirchand Lalchand v. Doolub Govindji*¹ and the latter by the decision of the same learned judge in the case of *Kanji v. Bhagwandas*² and the decision of the Appeal Court, consisting of the late Sir Lawrence Jenkins C. J and Batty J in *Bhagwandas v. Kanji*.³ So far as the law about the Katchi Adat system is concerned, it appears to be extant only in this Presidency and is now practically well settled by the final authority of the Privy Council. It is proposed here to point out the nature and course of dealings in the Katchi Adat system and the legal position of the Katcha Adatia in dealings entered in to by him on the basis of that system. The cases bearing on the subject, are only five in number. Two of these, viz., *Fakirchand v. Doolub*¹ and *Mukundchand v. Sobhagmal*⁴ deal with the Katchi Adat system as known and recognised in the Bombay cotton market, and the rest of the three, viz., *Abraham E. J. Abraham v. Binodiram Balchand*⁵

1. (1905) 7 Bom. L. R. 213.

2. (1905) 7 Bom. L. R. 57.

3. (1905) 7 Bom. L. R. 611=30
Bom. 205.

4. (1926) 28 Bom. L.R. 1376=51 Bom. 1.

5. Suit No. 997 of 1914 an unreported
decision of Macleod J., dated
22nd March 1915.

referred to in the case of *Abraham v. Sarupchand*¹ and *Kasturchand Sadasukh v. Chunilal Murliprasad*² deal with the Katchi Adat system as prevailing in the Bombay Silver market, though it must not be supposed that there is any difference between the two markets as regards the nature and course of dealings which are carried on the basis of this system. The Katcha Adatia unlike his brother the Pakka Adatia who bears a more complicated and complex character as shown in book No. I is an agent. Both provide the means whereby the outsider who is a stranger to the market (which is the important detail to notice) is enabled to enter into transactions in such commodities as he likes as he is not entitled to transact business except through the one or the other. The former the Katcha Adatia is an agent and is the channel through which the constituent who need not necessarily reside up-country and who is a stranger to the market transacts the business as stated before. The terms upon which the Katcha Adatia transacts his business are entirely different from those on which the Pakka Adatia does so. The Pakka Adatia is also an agent throughout the transaction, but as between himself and his constituent, he is also considered a principal for reasons already set out in Book No. I.

1. (1917) 42 Bom. 224=19 Bom. L. R. 608.

2. Suit No. 1623 of 1935 unreported decision of Kania J., dated 14th September 1936.

CHAPTER I.

KATCHI ADAT SYSTEM—COURSE OF DEALINGS
—BOMBAY COTTON MARKET.

THE course of dealing in the Bombay Cotton Market relating to the Katchi Adat system first came up for decision as stated before, before Chandavarkar J in *Fakirchand v. Doolub*¹ where the facts were as follows:—The plaintiffs trading as merchants and commission agents in Bombay brought the suit against the defendants carrying on business at Dholera for the recovery of the sum of Rs. 4,000 and odd as money paid by the plaintiffs on the defendants account to one P. N. There was no dispute that the plaintiffs acted as the defendant's commission agents and Katcha Adatias and that the transaction in dispute was governed by the Katchi Adat system. The suit arose in the following circumstances :—The defendants employed the plaintiffs firm to act as their commission agents and in the course of such employment in August 1903 the defendants gave to the plaintiffs an order to sell on their behalf 100 bales of Broach Cotton for forward delivery in March 1904. On receipt of the order to sell, the plaintiffs in accordance with the custom prevailing in the market sent for a broker and settled with him that he should bring a contract at Rs. 224-4-0 which was the rate then prevailing in the market. The broker informed the plaintiffs that he had then a contract which he had entered into with a firm trading in the name of P. N. at the rate of Rs. 225 and he offered to transfer the contract to the plaintiffs subject to what is called the broker's gala and the plaintiffs accepted that offer in their own name. The result of the transaction was that the difference of 12 annas became payable by the plaintiffs on behalf of the defendants as vendors to the broker. Soon after the transaction was entered into, the plaintiffs informed the defendants both by telegram and letter that they had sold on his account 100

bales of Broach cotton for March Vaida at Rs.224-4-0 and the defendants confirmed and ratified it. It was admitted by the plaintiffs that they had not informed P. N. that the defendants were principals for whom the plaintiffs were acting as agents in the transaction and the reason assigned was that it was not usual to give such information, because P. N. knew the plaintiffs and that the plaintiffs acted as usual as agents for undisclosed principals. It appears that the name of P. N. was not disclosed to the defendants though promised by the plaintiffs. After the date of the contract P. N. closed his shop and stopped payment though he re-opened it a fortnight later. Meanwhile the market kept on rising. P. N. demanded delivery in March from the plaintiffs, the Katcha Adatias, who in their turn pressed their principals the constituents to give delivery of the goods, but they failed and the plaintiffs were compelled to pay damages to P. N. being the difference between the contract rate and the market rate on the Vaida day. The defendants contended that by reason of the failure of the plaintiffs to give them the name of the purchaser, they were not able to decide whether they should have settled the contract before the due date and that the plaintiffs ought to have treated the contract as settled at the rate prevailing on the date on which P. N. the purchaser closed his shop and stopped payment. The plaintiffs answer was that no settlement such as the defendants desired could be made on the day of P. N.'s failure, because they (the plaintiffs) as commission agents doing business on the Katchi Adat system could not make any such settlement without the instructions from their principals. The learned Judge accepted the plaintiffs contention and holding that the defendants objection as to the settling of the contract on the date of P. N.'s failure was only raised as the market had risen during the interval of the closing of P. N.'s shop and his re-opening it a fortnight later passed a decree for the amount claimed by the plaintiffs in the suit. One of the contentions raised in the suit was whether the broker could make 12 annas per candy as profit in addition to his brokerage. It was

contended that being an agent he was not entitled to make any secret profit and that the defendant was not bound by the transaction because the broker being an agent employed to find a buyer in the market transferred his own buyer to the defendants. It was held by the learned Judge that this profit of 12 annas per candy was not one of the nature of a secret commission but palpably was one made by the broker as one incidental to the business in the usual course of trade warranted by a well known custom of the market, that such transfers were customary and tended to the convenience and benefit of all parties where the rates in the market are constantly fluctuating, that such transfers were well known and as business in cotton was generally done accordingly—a transaction like the one in dispute was as much a transaction in the market as any other that could have taken place if the broker had gone into the market and found some one willing to enter into the contract at the originally settled rate of Rs. 224-4-0.

Describing the course of dealing in the Bombay Cotton market relating to the Katchi Adat system the learned judge observed at pp. 215-217 of the report :

“According to these witnesses, whose evidence I accept as trustworthy, besides that it stands uncontradicted, business in cotton is generally done in the Bombay market through brokers by commission agents acting for their constituents. When an agent receives an order, he sends for a broker and settles the rate with him. The rate so settled becomes from that moment binding upon both the agent and the broker. This settlement is arrived at in consequence of the constant fluctuations in the market, which has a tendency; generally speaking, to jump up or come down, every two minutes. Where the agent has settled a rate with the broker, it becomes a contract between the two and the broker remains personally bound till he brings a party willing to take up the contract. The broker in such a case adopts one of two ways. He either brings a party willing to take up the contract and introduces him to the agent and the party and

the agent then exchange kabalas with each other : or, where the broker has got a contract of his own ready, he agrees to transfer it to the agent and then brings together the agent and the other party to his (broker's) contract and these two then exchange kabalas with each other. If, when the party is brought to the agent, the market rate is the same as the rate settled by the agent with the broker, the broker gets nothing beyond his commission. If, on the other hand, the market rate is higher or lower, the kabalas between the agent and the other contracting party become subject to what is called the broker's gala.

For the convenience of all the parties the brokers keep themselves ready with contracts entered into by them personally, which they can transfer to others. When, therefore, the broker has settled a rate with an Adatia, he either transfers to him one of his own contracts, if any, or if he has none, he goes into the market and brings some one willing to accept the rate settled. If at the moment he goes into the market he finds that the rate has changed, he procures some one willing to accept the contract at the rate *at that moment prevailing*. When this happens what is called the broker's gala comes into operation. If the rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. This payment of difference which is either *against or in favour* of the broker, according as the rate in the market is less or higher than the original rate, is called the broker's gala which the witnesses, who have spoken to the usage, describe as a term well known to cotton dealers and others in Bombay and to up-country constituents. The usage, they state, is confined not merely to cases where a broker goes into the market and finds a party willing to enter into the contract. It applies, also they say, where a broker has kept himself ready with contracts entered into by himself personally with other parties. Where the market is subject

to constant fluctuations, the brokers arm themselves with such contracts and transfer them, subject, as in the other cases, to the broker's gala. This usage, according to the witnesses, has long prevailed in the market, is well-known, and has tended to the convenience and benefit of all parties. I do not see that there is anything unreasonable in it. It resembles the usage of the Jobber's contract prevailing on the Stock Exchange in London, recognised as a valid custom by the House of Lords in *Nickalls v. Merry*¹ and in *Coles v. Bristowe*². The defendants contend that they were not aware of the usage: but having regard to the evidence before me that it is well known I cannot believe this plea of the defendants. Moreover, the authority to the plaintiffs having been to sell in the Bombay market carried with it all that was *necessary and usual* in the business in which the plaintiffs were employed to act, according to the usage of the market. There is no conflict between interest and duty in the fact that a broker having personally entered into contracts with another party transfers them to a third party after having settled a rate with the latter. He enters into the contracts himself before hand to provide against fluctuations in the market and the subsequent transfer causes loss to none of the parties concerned. And the broker's gala is not always in favour of the broker. It goes to the broker where the rate of the contract he procures is less than the rate he has settled. If it is higher, it is the broker who has to pay. He wins or loses as the rate is less or more and such a custom cannot be treated as unreasonable, having regard to the risks the broker runs."

On the question of brokerage, the decision of Chandavarkar J in *Fakirchand v. Doolub*³ was cited with approval by Kania J in the recent case of *Kasturchand Sadasukh v. Chunilal Murliprasad*.⁴ The learned Judge said in this connection: "As to the validity of the claim of

1. (1868) 7 H. L. 530.

2. (1875) 4 Ch. Ap. 3.

3. (1905) 7 Bom. L. R. 213.

4. Suit No. 1623 of 1935 unreported judgment dated 14th September 1936.

Damani there may be doubt. The plaintiffs are Katcha Adatias. That does not mean, however, that they act as such only in respect of transactions in bullion. It is well-known that the same Katcha Adatias act for their constituents in respect of transactions in cotton and other commodities. In the same way brokers like Damani are not necessarily doing brokerage business only in bullion but they do brokerage business also in cotton and other commodities, commonly dealt with in the locality in which bullion business is being done. Brokers in cotton when dealing with Katcha Adatias are, according to the decision in *Fakirchand v. Doolub*,¹ entitled to keep for themselves the difference in rates, which is called "the brokers gala." If so there does not appear to be anything unusual in a broker putting through a transaction in silver, similarly claiming to retain the difference as in this suit. The claim in any event, is not so improbable as to lead to the conclusion that in countenancing the same there was evidence of fraud of the plaintiffs. The plaintiffs had in my opinion, according to the observations in *Aston v. Kelsey*,² established that they brought about privity between the five merchants and the defendants. On finding that the broker had incorrectly informed the plaintiffs of the rate when the claim was made against the defendants, they corrected the difference and claimed what they are legitimately entitled to. The defendants point out that after this difference became known to the plaintiffs' clerk, the letter Ex. F was written to the defendants and even on 21st August it was stated that the defendants' purchases were at the rate of Rs. 72. Shivkaran stated that the letters would be written by the clerks according to the entries in the books. That only shows that Damani's claim had not till then been discussed and rejected by the plaintiffs. The court has to look to the substance of the whole transaction and cannot merely by reason of difference in rates conclude that the transaction was appropriated by the plaintiffs, when in fact, there was

1. (1905) 7 Bom. L. R. 213.

2. (1913) 3 K. B. 314.

definite and unchallenged evidence showing clearly that the plaintiffs had not done so."

Mr. S. G. Velinkar explains¹ the Katchi Adat custom as follows : " Under the Katchi Adat system the Katcha Adatia, hereinafter described as the agent, receives an order from an up-country constituent, say, for the sale of 100 bales of cotton at, say, Rs. 100 per bale. The Cotton Market is jerky and subject to hourly fluctuations. The agent knowing this sends for a broker and settles the rate with him, say, Rs. 101 per bale. This rate is binding on both the agent and broker from that moment. The broker remains personally bound till he introduces another party to the agent, who is willing to buy the 100 bales, and relieves the broker of his liability. If, when this other party, whom we shall call X, is found and introduced to the agent, he agrees to buy at no more than Rs. 100 only per bale, the broker is liable to pay the difference between Rs. 101 and Rs. 100, namely, rupee one to the agent. If, on the other hand, the market has gone up, and X is willing to buy at Rs. 102, the difference between Rs. 102 and Rs. 101 goes into the broker's pocket. In some cases the broker may transfer a contract previously made by himself with, say, Y to sell at a given rate, say, Rs. 100 to the agent ; and later on introduces Y to the agent, and in due course Y and agent exchange "*kabalas*" with each other. In this case the result is that the broker pays the difference between Rs. 101 and Rs. 100 to the agent. If, on the other hand, the rate agreed with Y is Rs. 102, the broker takes the difference between Rs. 102 and Rs. 101 from the agent. This payment of the difference, which is either against or in favour of the broker according as the rate has fallen or risen between the time the broker makes the contract with the agent and the time he finds a third party to make a contract with the agent, which relieves the broker, is known as the broker's "*gala*." The does not as a rule disclose his principal's name to the person agent with whom he eventually enters into a contract through the broker. The broker of course gets a certain percentage

1. Cf. The Law of Gaming & Wagering (1922) Edition p. 471-474.

as brokerage. According to the evidence recorded in *Fakirchand v. Doolab*,¹ this practice is well known and has prevailed for a long time." Mr. Velinker then cites the passage from the judgment of the learned judge at p. 217 beginning with the words : "I do not see that there is anything unreasonable in it" already cited before and continues, "It will be seen from what has been stated that the broker's *"gala"* is not always in favour of the broker ; and as Chandavarkar J has pointed out, there is no conflict between interest and duty in the fact that a broker having personally entered into contracts with another party, transfers them to a third party after having settled a rate with the latter. *Fakirchand v. Doolub*¹. There is nothing dishonest or criminal in the circumstance that the broker makes a profit by reason of the fact that the market has gone up and he is lucky enough in securing a buyer at Rs. 102. If the market had gone down to Rs. 99 the broker would have had to pay Rs. 101 to the agent all the same and thereby suffer a loss of Rs. 2. That being so there can be no reason why if the market went up he should not be entitled to make a profit. Such a profit would not be therefore a wrongful gain."

The decision of Chandavarkar J, in *Fakirchand v. Doolub*¹ was approved by the Appeal Court, consisting of the late Mr. Justice Shah, then Acting Chief Justice and Mr. Justice Kincaid in the case of *Mukundchand Balia v. Sobhagmal Gianmal*.² The learned judge after referring to and approving of the said decision of Chandavarkar J shortly summarised the incidents of Katchi Adat in the following words : "It is not disputed and cannot be disputed that a Katcha Adatia in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and that when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay the Katcha Adatia and

1. (1905) 7 Bom. L. R. 213, 217.

2. (1924) 26 Bom. L. R. 1097, 1100, 1101.

his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the Katcha Adatia transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The Adatia enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent the name of the principal not being disclosed.....Thus it is essential to remember that when under instructions from the defendant, the up-country constituent, the plaintiff (the Katcha Adatia) enters into transactions with third parties in Bombay, as his Katcha Adatia, he (the Katcha Adatia) does so in terms on behalf of an undisclosed principal as his agent and that privity of contract is established on his entering into these transactions between the third parties and the defendant the constituent."

In the appeal preferred against the said decision of the Appeal Court to the Privy Council, Lord Justice Warrington who delivered the judgment of the Board¹ described the course of business and the relative position of the parties in Katchi Adat transactions which were not in dispute in the following words: "When a Katcha Adatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but he also renders himself liable on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position therefore as between himself and the third party is, that he is an agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf.

1. (1926) 28 Bom. L. R. 1376, 1379-80=(1927) 51 Bom. 1. 5, 6, =53 I. A. 241

CHAPTER II.

KATCHI ADAT SYSTEM—COURSE OF DEALINGS
—BOMBAY SILVER MARKET.

THE incidents and custom relating to the Katchi Adat system prevailing in the Bombay cotton market has been dealt with at some length. The custom in the Bombay Silver Market will be dealt with now, but it must not be supposed that there is any difference in the custom in the two markets, for the custom, alleged by the defendant to exist in the silver market was held by the Appeal Court not to have been proved. The custom prevailing in the silver market came up for decision and was elaborately dealt with in two cases in both of which the plaintiff was the same. The first case *Abraham E. J. Abraham v. Khetsidas Lachminarayan & Binodiram Balchand*¹ came on for hearing before Macleod J. In this case in July 1914 the plaintiff a wealthy Jewish merchant instructed his brokers to purchase silver on his behalf for the Shravan Vaida. On the Vaida day, i.e. the 12th August 1914, the brokers made contracts with certain Marwari firms, but as the vendors according to the usual practice would not recognise the plaintiff, the contracts had to be registered with another Marwari firm. Accordingly on the 18th July 1914, the plaintiffs wrote to the first defendant firm asking them to enter into a contract on his behalf as his Katcha Adatias for the purchase of 50 bars of silver already effected through a certain broker on the 15th July 1914 and asked them to enter into a contract on his behalf for the purchase of 8 more bars. The first defendants thereupon entered into a contract with the second defendants for the purchase of 50 bars and entered into other contracts with other parties in respect of the remaining bars. On 11th August the first defendants asked the second defendants for delivery. Under the rules of the Panch Shroff Association

1. Suit No. 997 of 1914 judgment delivered on the 22nd day of March 1915.

admittedly applicable to this case a delivery order had to be sent by the second defendants on the 12th August, actual delivery being taken and payment made on the 7th Vad-13th August, but on the morning of the 12th August, the second defendants informed the first defendants that they were unable to give delivery owing to the War and the state of the Bazar. Admittedly a delivery order was sent by the second defendants on the 14th August 1914, but was refused as being tendered too late. On the 4th September, the plaintiff's solicitors wrote to the second defendants that he had instructed the first defendants as his Katcha Adatias to purchase 50 bars of silver and that he had been informed that the first defendants under his instructions had purchased 50 bars from the second defendants, that as no tender had been made on his behalf, he had purchased 50 bars on the 22nd inst. at Rs. 79 and called upon them to pay him the difference. The second defendants replied that they had no contract with the plaintiff and therefore were not liable to him. Before that the plaintiff had had correspondence with the first defendants and they had disclaimed any liability or responsibility in respect of the contract registered with them for the purchase of the plaintiffs as they said the plaintiff knew perfectly well who the vendors were.

The learned judge held that the second defendants had committed a breach of the contract entered into by the first defendants as plaintiffs agent and that the plaintiff was entitled to sue the the second defendants for damages and that he was not bound by the rate fixed arbitrarily by the Marwari Panch Shroff Association and passed a decree against the second defendants, but dismissed the suit against the first defendants with costs. In other words the learned judge held that apart from custom the constituent was entitled to recover the damages.

After stating the facts as stated above the learned judge in his judgment observed :

"The position therefore was that the plaintiff had instructed the first defendants to enter into a contract on his

behalf for the purchase of 50 bars of silver. The first defendants entered into the contract with the second defendants as agents for an undisclosed principal. If the second defendants had tendered delivery to the first defendants and the first defendants had neglected to inform the plaintiff thereof or that he might put them into funds to take delivery, the first defendants would be liable to the plaintiff. The plaintiff therefore had to make both first and second defendants parties to the suit, as he could not tell whether the second defendants had committed a breach of their contract or whether the first defendants had failed in their duty as an agent. O. I, r. 7.

It was contended by the second defendants that if they had known the plaintiff was the undisclosed principal, they would not have entered into the contract with the first defendants. The second defendants munim had to admit that all they required was a substantial party. Moreover he was perfectly well acquainted with the plaintiff who was a substantial party and had had dealings with the firm for many years. But being outside the Marwari ring they would not allow his name to appear on the contract. If such a contention were to be upheld it would put an end to all the vast business done by Marwaris as Katcha Adatias for outsiders."

In the other case¹ the facts were exactly similar with one difference only, viz. that while in the suit before Macleod J, the plaintiff sued not only the selling shroff, but also impleaded his Katcha Adatias in the alternative, in the latter suit before Beaman J, he impleaded the selling shroff alone. In both the suits the defence of the selling shroff was want of privity of contract between the plaintiff and himself, but in the latter suit the want of privity of contract was expanded and sought to be based on a custom alleged to exist in the silver market which defence of custom though formally raised before Macleod J in the form of an issue and found upon,

1. *Abraham E. J. Abraham v. Sarupchand Hukamchand* suit No. 542 of 1916; unreported judgment of Beaman J. dated 21st November 1916.

was not seriously pressed before him nor was it even argued and there is nothing in the judgment of the learned judge to indicate that it was present to his mind or that he intended to answer it.

Before the decision of Macleod J, Abraham who was fully conversant with the custom of the market and the usual course of the dealings contended that Hiralal Ramgopal as Katcha Adatia was responsible to him and he declined to have anything to do with Sarupchand, between whom and Hiralal Ramgopal the contract in the first instance for the sale of 50 bars of silver had been made. After the decision of Macleod J, as the Katcha Adatia was discharged from all liability in that suit and Abraham made to pay his costs, he completely changed his ground and asserted the full liability of the defendant Sarupchand from the first, but the defence which was barely hinted at in the former case before Macleod J was made virtually the only ground of defence in the suit before Beaman J upon an exactly similar contract on the same terms and almost between the same parties. The defence was that there was a custom of the silver market whereby the selling shroffs were not personally liable to the principal of the buying Adatias, non-liability on the ground that if they had known Hiralal Ramgopal was not a principal they would not have entered into the contract. The course of dealings prevailing in the Silver market was elaborately discussed by Beaman J in the latter case just cited. The learned judge in his judgment said in this connection.

"Indeed the general course of dealings is well-known and is not restricted to the silver market. That market is controlled by a body of influential shroffs and chocksies, while a limited number of wealthy and reputable brokers appear to be accorded similar privileges. Any outsider desiring to speculate that is to buy forward or sell forward, with any of these shroffs or chocksies must get his contract registered in the name of another member of the same Ring or Association. The Association of shroffs is governed by Rules, but none of the rules specially lay down

the conditions, I am here describing. Nevertheless, it is certain that no shroff whether dealing with a constituent of his own or on his own account with some other outsider will enter into any direct forward contract unless it is made in form at least directly with another shroff. That is to say, if A, an outsider, desires to speculate with B, in silver for a future Vaida, B, will only consent to do so on condition that the contract is registered as between himself and C, another shroff. I use the term shroff generally here to avoid cumbersome repetition as including all privileged members of the Association. Thus, A is desirous of buying forward, let us say, from S a shroff. S may be quite willing to sell, but according to the practice of this market he will not sell direct to A but will insist upon A giving him the name of some shroff with whom he may make a forward selling contract. In the present case the shroff so employed by Abraham to effect his forward speculative contract with the defendant Sarupchand was Hiralal Ramgopal, and the object of all this is clear. A very large majority of these forward speculations are probably wagers and shroffs do not care to incur the risk of those, who are speculating with them on these terms, repudiating their bargains. They can as a rule depend upon each other to carry them out. That is why they insist upon every contract of the kind being in form a direct contract between shroffs as principals. Two such shroffs appearing as principals in a forward selling contract may have each his own outside constituent who is the person really interested and the evidence is that in such cases outside constituents have no remedy whatsoever against the shroff in the inner Ring with whom they have contracted through the medium of a shroff employed by themselves. Taking the concrete case and adopting all the facts alleged by the plaintiff what actually happened was that the plaintiff's broker Bholaram went to the defendant Sarupchand on the 13th of July 1914 and asked whether he would sell 50 bars of silver at Rs. 75 per 100 tolas for the August Vaida, due date 12th or 13th. Sarupchand agreed to do so provided Bholaram

would bring the name of another shroff. Had Bholaram himself been a reputed broker he might have at that point concluded the bargain in his own name and reported to his principal Abraham that he had made a contract with Sarupchand on his behalf for the sale of 50 bars, August Vaida. As it was, Bholaram mentioned Hiralal Ramgopal as the plaintiff Abraham's Katcha Adatia or shroff. Accordingly Abraham wrote on 13th of July 1914, a letter, Ex. A. in the case, to Hiralal Ramgopal requesting him to enter into a contract on his behalf for the purchase of 50 bars of silver etc. agreed to be purchased by his broker Bholaram. There can be no doubt that all the three parties were perfectly well aware of the parts that each was playing in this transaction. I have not the least doubt that Sarupchand in spite of subsequent denials knew perfectly well that Abraham was the person for whom the silver he was selling nominally to Hiralal Ramgopal was being bought. Hiralal Ramgopal of course knew that he was employed by Abraham to carry the contract through since according to the unwritten rules of the Association and the universal course of dealings it would be impossible for Abraham to enter directly into a contract of this kind with Sarupchand. Now, the person employed is Hiralal Ramgopal, he was employed in this transaction by Abraham, that is to say as a Katcha Adatia and was remunerated at the rate of Re. 1 a bar of silver. This remuneration may be called a commission and the plaintiff in the form his case has now taken naturally insists upon this feature of the transaction. Hiralal Ramgopal on receipt of Abraham's instructions to enter into a contract with the defendant Sarupchand for the purpose of 50 bars of silver at Rs. 75 per 100 tolas for August Vaida, at once entered into the required contract and its complete form is exhibited in his books, Ex. B. There Hiralal Ramgopal records that Sarupchand had sold and he Hiralal Ramgopal had bought 50 bars of silver at the stipulated rate etc. that is to say Sarupchand is credited with the price. Above this is a debit entry to Abraham which in form would make it appear that he Abraham had bought 50

bars at this price from Hiralal Ramgopal. There are those two distinct contracts evidenced by the writings, Ex. B and were it not for the undoubted fact that Abraham had paid Hiralal Ramgopal to make this contract for him and that notwithstanding its form the contract was intended to be made for the benefit of Abraham there could have been no doubt but that so far as Sarupchand was concerned no privity of contract appears to have been established between him and Abraham." It was contended before the learned judge in this suit that just as the Pakka Adatia becomes in the fullest sense a principal contractor changing his relation from that of agent to that of principal the Katcha Adatia also does the same by custom under two important qualifications or conditions; the first of these was that in the event of the person, with whom he contracts for the benefit of his employer becoming insolvent, the whole contract as between the Katcha Adatia and his employer became void. The second important qualification or condition was that in the event of the person with whom the Katcha Adatia makes a contract for the benefit of his employer refusing to perform the contract although capable of doing so the liability of the Katcha Adatia to his principal is in the first place restricted to enforcing the contract by process of law when the principal has put him in funds to do so and guaranteed all costs. It is only when the original employer has offered to put his Katcha Adatia in motion against the other party who was committed the breach of the contract and the Katcha Adatia has refused to proceed, that according to the bulk of the evidence recorded here the Katcha Adatia's employer may in turn set the law in motion against his Katcha Adatia and in every case of that kind the basis of the suit would be a contract between principal and principal. The first contention was accepted by Beaman J but not the second. The court of appeal refused however to accept either.

The learned judge gives in graphic terms the reasons why shroffs in the silver market while doing business on

Katchi Adat terms insist upon the particular mode in the following terms.

"I think, in the first place that the reason which has induced shroffs dealing in the silver market to insist upon this mode is as I have before observed that a very large majority of contracts so effected are pure wagers. Naturally then different considerations would come into play in estimating the reasonableness or otherwise of customary modes of dealing directed to such ends than might be applicable in the conduct of strictly regular business. It will, however, I think be apparent on a consideration of what always happens when an outsider desires to speculate in silver with a shroff that the form given to the dealing as a whole is intended not so much for the security of the outsider as to protect the shroff from harassment from without. The Rs. 50 paid by Abraham to Hiralal Ramgopal as the reward of his services in entering into this contract with Sarupchand would clearly not entitle Abraham to any very great advantage or onerous services at the hands of Hiralal Ramgopal. The need of the insertion of Hiralal Ramgopal's name instead of that of Abraham is clearly Sarupchand's need of guarantee and protection, and the evidence given by all the Marwaries who have been examined here shows that this is the primary motive. Sarupchand, whether we regard for the moment, Hiralal Ramgopal merely as an agent and Abraham as principal, is to be guaranteed by Hiralal Ramgopal. About that there is no doubt. Every one is agreed that when contracts such as those evidenced by Ex. B in this case have been made, Hiralal Ramgopal in the event of Abraham repudiating or failing to fulfil his contract would be answerable to Sarupchand." These reasons, it is submitted, are on the whole correct, except that the learned judge was mistaken in thinking that a large majority of contracts so effected on Katchi Adat terms were pure wagers. The real reasons are given by the learned judge himself in the rest of the passage just cited.

The learned judge held that the custom set up by the defendants was established, and that the plaintiff had no remedy against the defendant, whatever might be his remedy against his agent Hiralal Ramgopal and dismissed the suit. He held that the mere fact of Abraham having paid Hiralal Ramgopal Rs. 50 to make a contract of the kind he required with Sarupchand and having made it to remake it again with himself did not establish any privity of contract between him (that is Abraham) and Sarupchand. The plaintiff appealed.

The appeal Court consisting of Scott C. J and Heaton¹ J held that the evidence led by the defendant fell far short of proving the custom alleged, that if at the date of breach, damages were recoverable by the usual and recognised measure, it did not matter whether the adatia or the principal is sued if any suit is necessary and that the ordinary law of principal and agent applied and the plaintiff was entitled under the contract to claim the difference in price between the contract rate and the market rate at the time of breach. Beaman J in the lower court and the court of appeal held that the defence that the defendant would not have contracted if he had known that Hiralal was not a principal was not tenable, Beaman J holding that Sarupchand knew as a matter of fact that Abraham was a principal and this finding of Beaman J was also confirmed by the court of appeal.

The custom in Katchi Adat transactions for forward delivery in the Bombay silver market, so far as it was admitted to exist by both the parties to the suit, has been described by Scott C. J in his judgment as follows :—" It is not disputed that a custom of the Bombay silver market for forward contracts is that only shroffs are the ostensible buyers and sellers though shroffs may have and often do have outside principals for whom they are acting. The Shroffs, when acting for principals, work sometimes for Katchi Adat and sometimes for Pakki Adat. In the case of Katchi Adat the Adatia Shroff guarantees the performance of the contract to

1. *Abraham v. Sarupchand* (1917) 19 Bom. L. R. 608 = (1917) 42 Bom. 224.

the other Shroff, but does not guarantee its performance to his own principal. In the case of Pakki Adat the Adatia Shroff, who then acts for a higher rate of commission, is liable as a principal both to his own employer and to the other shroff. This custom whereby only Shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari Shroffs : first, that on every forward silver transaction a commission becomes payable to one or both of the Marwari Shroffs; and, secondly, that the Adatia Shroff guarantees to the other Shroff performance of the contract."

It will thus be seen that this was a simple case in which the plaintiff Abraham had employed Hiralal Ramgopal as his Katcha Adatia for the purchase of silver in the Bombay market. The Katcha Adatia bought the silver from the defendant Sarupchand pursuant to the orders of his constituent, the plaintiff. The defendant Sarupchand committed a breach of the contract and refused to deliver the goods and denied his liability to the plaintiff Abraham on the ground of custom, a custom which was held not to have been proved by the court of appeal, though upheld by Beaman J in the trial Court. The appeal court decided the case on the footing of agency, treating the Katcha Adatia as an agent contracting on behalf of an undisclosed principal.

The nature and course of dealings in the Bombay silver market was recently described by Kania J in a recent case¹ where his Lordship observed :

"The mode of effecting transactions in silver by a Katcha Adatia in the Bombay market is as follows : Sometimes the upcountry client arranges his transaction with the Bombay merchant direct and the Katcha Adatia has merely to note the transaction as between himself and the Bombay merchant. In other cases he receives instructions from his up-country client to put through a certain transaction. In the ordinary course he instructs a broker to put through the transaction in the market and the broker reports to the

1. *Kasturchand Sadasukh v. Chunilal Murliprasad*, unreported judgment of Kania J dated 14th September 1936 in suit No. 1623 of 1935.

Adatia that the transaction had been effected at a certain rate. When the broker informs the Adatia about the transaction having been effected at a particular rate, for a particular delivery, he does not at the same time necessarily mention the name of the third party with whom the transaction was arranged. Under the circumstances it would often happen that the Adatia may advise the client that the transaction has been put through as instructed by him and later in the day the broker would inform the Adatia of the name of the parties with whom the different transactions were arranged. After the particulars are so given, the Adatia makes entries in his rough soda book and these entries are signed by the broker in the first instance. The entries from the Katcha Soda book are then taken to the fair Soda book and from there they are posted in the ledger. The Rajuat book is a separate book. In that the clerks of the respective parties give their signature to show the acceptance or confirmation of the transaction...

The premium is not initially credited or debited to the party because if the option results in a transaction the amount of the premium is included in the rate of the resulting transaction. That is why in the plaintiffs books for the first time this premium was credited in the account of Raichand Motichand on 13th August."

The learned judge in this connection observed later on in his judgment. "Having regard to these judgments and also the judgment of the Privy Council, after briefing referring to *Abraham v. Sarupchand*¹ and *Mukundchand v. Sobhagmal*² it is not disputed that a Katcha Adatia is an agent. But he is not merely an agent. He receives commission and is instructed to put through transactions. His duty is to effect transactions with a third party and not to appropriate them to himself. He is not obliged and it is not his practice to disclose his client's name to the merchants in Bombay. In law, when a transaction is thus effected, privity is established between the client and the merchant and

1. (1917) 42 Bom. 224=19 Bom. L. R. 608. 2. (1926) 28 Bom. L. R. 1376=51 Bom. 1=53 I. A. 241.

if the client, before the due date, discloses himself and offers to perform the contract, it is the duty of the Adatia to see that the contract is performed either by giving or taking delivery as the case may be. One important aspect of the Katchi Adat system is that although the Bombay merchant knows on whose account the transaction is put through, and the case of *Abraham v. Sarupchand* and the facts of the present case show that sometimes the transactions are directly negotiated by the client with the Bombay merchant and the Adatia is only asked thereafter to note the transactions in his name, the Bombay merchant does not enter the transaction in the name of the up-country client. Therefore although the Bombay merchant knows the name of the party on whose account the transactions may have been entered, he insists on recognising the Adatia as the principal in the transaction and liable to him for the performance thereof. In his turn the Adatia has the right to enforce the transaction against the Bombay merchant. Correctly speaking it is not also a case of guarantee, because the obligation of the Adatia to the Bombay merchant does not depend on the failure of the up-country client to perform the contract. To the Bombay merchant the Adatia is the principal party liable on the transaction."

CHAPTER III.

THE KATCHA ADATIA AND WAGERING.

Now that the nature and incidents of the Katchi Adat system has been explained, the reader will find it easy to grapple with the question of wagering in connection with these transactions. There is only one case bearing on the subject.¹ The facts of the case were that the plaintiff Mukundchand Balia doing business as a Katcha Adatia in Bombay in consideration of the payment of his commission, entered into certain forward transactions for the sale and purchase of Broach cotton and also Teji-Mandi transactions in Broach cotton on behalf of the defendant, his up-country constituent one Sobhagmal Gianmal with third parties in Bombay. A large number of the said transactions with the third parties were also entered into by the constituent himself or his munim, who then gave the plaintiff's name as his Katcha Adatia and the third parties with whom the contracts were made, had thereupon the liability of the plaintiff, as the defendant's Katcha Adatia. There was an agreement between the plaintiff (the Katcha Adatia) and the defendant (his up-country constituent) that the latter was not to be called upon to give or take delivery, but was only to pay or receive differences in respect of the forward contracts and that the Teji-Mandi transactions were meant to cover him against any possible losses on the forward contracts. No such agreement existed, however, between the plaintiff (the Katcha Adatia) and the third parties with whom the various transactions were entered into. On the whole, the result of all the transactions taken together was a loss of about Rs. 1,83,300 and odd inclusive of interest upto the date of the suit which, the plaintiff paid and for the reimbursement of which, as indemnity due by a principal to his agent, he sued the defendant. The defendant pleaded that all the contracts were in the nature of

1. *Mukundchand Balia v. Sobhagmal Gianmal* (1924) 26 Bom. L. R. 1097.

wagering transactions and therefore unenforceable under s. 30 of the Indian Contract Act and the Bombay Wagering Act (Bombay Act III of 1865).

It was admitted by the defendant in his evidence that he had employed the plaintiff as his Katcha Adatia at 4 annas commission and that he was to pay, if the other party that is the third party with whom the contract was entered into by the Adatia failed and that the plaintiff was not liable for the loss of the goods or his transactions and that the plaintiffs used to inform him of the persons with whom the transactions were effected. The learned trial judge Kemp J before whom the suit came on for hearing in the first instance found that so far as the third parties in Bombay were concerned, the transactions were not wagers, but that they were real contracts and that as between the plaintiff and the defendant on the one hand and those third parties, they were such as could be enforced in law by or against them. The learned Judge treated the forward transactions and the Teji-Mandi transactions on the same footing so far as the question of wager was concerned and held that all the transactions were wagers and found that the circumstance that there was no arrangement with the third parties in Bombay that they had only to receive or pay differences was immaterial if there was an arrangement with the agent that the defendant would only be called upon to pay or receive the difference, as according to the opinion of the learned judge, the nature of the contract with the third parties in Bombay could not affect the question between the plaintiffs and the defendant as such and could not prevent them from being wagering. He accordingly held that the forward and Teji-Mandi transactions were void and dismissed the suit. The plaintiff appealed against the said decision and the appeal came on for hearing before the late Mr. Justice Shah, then Acting Chief Justice and Kincaid J, who reversing the decision of Kemp J, held the forward contracts and Teji-Mandi transactions not to be wagering and decreed the plaintiff's claim, observing that in order to establish the plea of wager, it was necessary for the defendant

to prove that the common intention of the defendant and the plaintiff on the one hand and of the third parties on the other hand was to deal in differences only. The judgment of the Appeal Court was delivered by Shah Ag. C. J.¹. The learned judge, after stating the facts of the case and describing the course and nature of the dealings in Katchi Adat transactions in dealing with the question of wager in such transactions observed :

"On these facts the question arises whether the transactions in suit can be treated as wagering transactions. The learned trial judge is of opinion that the circumstance that there was no arrangement with the third party that he should only receive or pay differences is immaterial, if there was an arrangement with the agent that the defendant would only be called upon to pay or receive differences. In coming to this conclusion the learned judge has been influenced by the decision in *Manilal Raghunath v. Radhakison Ramjivan*.² Apart from the decisions, where the plaintiff is employed as a Katcha Adatia by an up-country constituent and where transactions are entered into by the Adatia with third parties in Bombay, and where we have, as in this case, the circumstance that the intention of the third parties is not shown to be to deal in differences only, it seems to me that it is not enough for the defendant to prove an agreement between himself and his Adatia that the Adatia would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. The two parties to the contract in this case would be the defendant and his agent on the one hand and the third party with whom the Adatia enters into the contract on behalf of the defendant on the other hand. It is essential for the defendant to prove, not what his arrangement with the plaintiff was, but as to whether there

1. (1924) 26 Bom. L R. 1097, 1102-1105. 2. (1920) 22 Bom. L. R. 1018=45 Bom. 386.

was a common intention to wager as between him or the plaintiff on the one hand and third party on the other. In this case it is established that the contract which is entered into by the Adatia on behalf of the up-country constituent is a real contract which is enforceable against the third party by the defendant. The mere fact that as between the defendant and his agent there is an arrangement that the agent shall so arrange business as not to require the defendant to give or take delivery is a matter which does not affect the nature of the contracts as between him and the third party in Bombay, but is a matter, merely between him and the plaintiff, not affecting the nature of the contract. Having regard to the admitted course of business between the parties and the law on the point, I should feel little difficulty in holding that the plea of wager is not open to the defendant, unless he is in a position to prove that the transactions entered into with third parties on behalf of the defendant were wagers, *i.e.*; that the common intention of the defendant and the plaintiff and the third parties was to deal in differences only." The learned Judge then reviewed the decided cases bearing on the subject, especially the case of *Manilal v. Radhakison*¹ a case dealing with Pakki Adat transactions and then observed :—"That situation could arise in the case of a Pakka Adatia, because as between the Pakka Adatia and the up-country constituent, both are principals with reference to the contract, and it does not matter in the least as to whether the Pakka Adatia has entered into other contracts with third parties to cover that contract or not. It is entirely a matter of his discretion and choice to enter into contracts with third parties; but the contract between the Pakka Adatia and the up-country constituent is complete. In the case of a Katcha Adatia it is not so. If the Katcha Adatia does not enter into a contract with a third party in pursuance of the instructions given by the up-country constituent there is no contract and the order of the constituent remains an

1. (1920) 22 Bom. L. R. 1018=45 Bom. 386.

unexecuted order. It is only when he enters into a contract with the third party on behalf of his constituent that the contract is complete, with this additional circumstance that the Katcha Adatia guarantees payment of losses on behalf of the up-country constituent to the third party in Bombay. The learned then cited the observations at p. 419 from the judgment of Macleod C. J in *Manilal v. Radhakisson*¹ already cited before at pp. 23 & 24 of Book No. I and continued :

"In the present case, the contracts clearly fall within the first and third categories. As I have already pointed out, the contract is complete as between the defendant and the third party in all respects, with this additional circumstance that the Katcha Adatia stands guarantee for the payment to the third party in Bombay for losses and that the name of the up-country constituent is not disclosed to the third party, though the fact that the Adatia is acting as an agent is undoubtedly disclosed to the third party in Bombay. In such a case the transaction may be a wagering transaction but only if the common intention of the two parties, *i.e.*, the third party in Bombay and the up-country constituent, to deal in differences only is proved. Unless that is proved, it cannot be treated as a wagering transaction."

As a result the Appeal Court reversed the decision of Kemp J, allowed the appeal and held that the transactions were not wagering, as it had not been shown that the third parties with whom the plaintiff made agreements were parties to the understanding between the plaintiff and defendant not to give or take delivery, but only to deal in differences and directed an account of what was due from the appellant to the respondent. Against this decision of the Appeal Court an appeal was preferred by the defendant to the Privy Council who confirmed the decision of the Court of Appeal and held that the transactions were not void as wagering as they did not fall either within S. 30 of the Contract Act or within Ss. 1 and 2 of Bombay Act III of 1865, that the respondent was entitled to be indemnified by the appellant

1. (1920) 22 Bom. L. R. 1018=45 Bom. 386.

against losses for which he became liable to third parties and that the understanding between the appellant and the respondent only meant that the respondent would by covering contracts or otherwise, provide for or take the goods or pay the differences on the appellant's behalf. Lord Justice Warrington delivering the judgment of the board¹ dealing with the question of wager observed at pp. 14 & 15 of the report.

"The respondent, as the appellants agent, and acting in accordance with his mandate, made genuine contracts on his behalf with third parties in Bombay. Under these contracts both the appellant and the respondent were bound to the third parties either to perform their obligations or to pay damages for their breach. The respondent having entered into these contracts as agent for the appellant, the latter was *prima facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them—a gain to the appellant would involve no loss to the respondent nor would a loss to the appellant result in a gain to the respondent. The only remuneration to the respondent was his commission. See (*Forget v. Ostigny*²). The understanding between them referred to above merely means that the respondent would, by covering contracts or otherwise, provide for or take the goods or pay the difference on the appellant's behalf. In all this there is not, in their Lordships opinion, any element of wagering as between the two parties. As between them neither party stands to win from or lose to the other according to fluctuation of price or any other event. The very essence of a wager between them is thus absent.

Counsel for the appellant raised before this Board a new point, founded on ss. 1 and 2 of the Bombay Act III of 1865. But once it is established that the contracts with the third parties are genuine contracts and not wagering transactions, the provisions of these sections have no application and the point therefore fails."

1. (1926) 28 Bom. L. R. 1376, 1381=51 2. (1895) A. C. 318, 322.
Bom. 1, 14-15=53 I. A. 241.

CHAPTER IV.

KATCHA ADATIA—NON-DISCLOSURE OF THE NAME OF
THE THIRD PARTY IN BOMBAY—HIS POSITION.

Now let us suppose that a Katcha Adatia does not disclose the name of the third party in Bombay to his constituent as he is bound to do according to the custom prevailing in the market. In this case, so far as the position of the constituent with regard to the third party is concerned, the same is clear enough as privity of contract is established between him and the third party as soon as the Katcha Adatia under his instructions puts through the transactions on his behalf and the constituent has then certainly a right of action against the third party for recovery of the amount due from him even though the Katcha Adatia has not disclosed his name to his constituent. This result seems naturally to follow from the judgments of Shah A. C. J in *Mukunchand Balia v. Sobhagmal Gianmal*¹ in appeal and of Lord Justice Warrington in the Privy Council².

Now so far as the position of the Katcha Adatia himself is concerned, two questions arise in this case. The first is whether he is bound to pay the amount of the valan that is the amount which becomes due and payable to the constituent on the settlement and secondly whether he is liable for negligence in the matter if he fails to recover the amount due on the settlement from the third party and becomes insolvent. From the several judgments cited above, it has been seen that it is the duty of the Katcha Adatia to disclose the name of the third party in Bombay to his constituent and that his position is merely that of an agent, the name of the principal not being disclosed and that privity of contract is established between the constituent and the third party only on the Katcha Adatia entering into the transactions with the third party under instructions from his constituent. In the first

1. (1924) 26 Bom. L. R. 1097.

2. (1926) 28 Bom. L. R. 1376=51
Bom. 1=53 I. A. 241.

case sec. 211 of the Indian Contract Act III of 1872 seems to be clearly applicable inasmuch as the Katcha Adatia has failed to carry out his duties according to the custom and if his principal sustains any loss, he is bound to make it good to him and if any profit accrues, he is bound to account for it to his principal as he has received the amount of the valan that is the profits accrued due to the constituent on settlement.

In the second case also, it would appear that the Katcha Adatia is liable for breach of duty and negligence, as he has failed in his duty not only in not disclosing the name of the third party to his principal, but also in not receiving the amount of the valan from him, though he is not a guarantor to his principal. But though the Katcha Adatia would be thus liable, his liability counts for nothing inasmuch as he having become insolvent, it is difficult to understand of what advantage it is to the constituent to sue the insolvent Katcha Adatia.

It will have been seen that it is one of the most important duties of the Katcha Adatia to inform his principal of the name of the third party in Bombay with whom he contracts in pursuance of his principal's orders though he is not bound to give the third party the name of his constituent. In *Fakirchand v. Doolub*¹ before Chandavarkar J great grievance was made by the defendants of the fact that the plaintiff Katcha Adatias had not given them the name of the third party in Bombay with whom they had contracted on the ground that if the name of the third party had been given to them at once, they would have been in a position to decide whether they should have settled the contract before the third party closed his shop. The learned judge treated this complaint only as an afterthought and brushed it aside. In the two silver cases^{2 3} of the plaintiff Abraham before Macleod J and Beaman J, Abraham was informed of the names of the selling

1. (1905) 7 Bom. L. R. 213.

2. *Abraham v. Khetsidas*, suit No.

997 of 1914.

3. *Abraham v. Sarupchand*, suit No.

542 of 1916.

shroffs and consequently there was no grievance on this score. In Sobhagmal's case¹ also the constituent was informed of the name of the third party and hence there was no such grievance in that case also.

It is interesting to inquire why the information about the name of the third party to the constituent by his Katcha Adatia is insisted on and is made an essential incident of transactions entered into on the Katchi Adat system. It is obviously unnecessary on the part of the Katcha Adatia to give the name of the constituent to the third party, for the simple reason that though privity of contract is established between the third party and the constituent, he the third party looks only to the Katcha Adatia for the due performance of the contractual obligations and it does not matter in the least to him even if he does not know the name of the Katcha Adatia's principal. So far as the constituent is concerned, it is obviously entirely necessary for him to know the name of the third party, because privity of contract is established between the Katcha Adatia's constituent and the Bombay shroff as soon as the Katcha Adatia enters into the contract in pursuance of his principal's orders and it is in order to enable him to pursue his remedies against the Bombay shroff in case of his default in the performance of the contract that it is necessary for him to know the name of the Bombay shroff. In the case of Pakki Adat, this knowledge of the name both ways is unnecessary, as both the constituent and the third party in Bombay look solely to the Pakka Adatia for the performance of the contract, no privity of contract being established between them. As the Pakka Adatia is regarded as a principal for all practical purposes.

CHAPTER V.

SUMMARY.

THE principles of law relating to the Katchi Adat system of transactions and the nature and course of the business done on the basis of that system may be summarised as follows :—

1. The Katcha Adatia is purely an agent acting on behalf of his constituent up-country or local who is an undisclosed principal.

2. On receipt of an order from the constituent for sale or purchase of a certain commodity, the Katcha Adatia has to carry out his instructions and enter into contracts with third parties in Bombay and privity of contract is established between the third party in Bombay and the constituent, only when the Katcha Adatia enters into transactions with third parties in Bombay in pursuance of the order. If he does not do so, the order remains an unexecuted order and there is no contract whatever.

3. The Katcha Adatia is responsible for the fulfilment of the contract to the third parties in Bombay with whom he enters into contracts on receipt of an order from his constituent, though he is not responsible to his own principal the constituent who has to look to the third party in Bombay for the fulfilment of the contracts. The third party in Bombay is, however, entitled to hold the Katcha Adatia's undisclosed principal the constituent liable for the performance of the contracts entered into by him through the Katcha Adatia.

4. The name of the constituent is not disclosed to the third parties in Bombay, though the name of the third party in Bombay is disclosed to the constituent. The third party in Bombay, however, knows perfectly well and he is informed by the Katcha Adatia to that effect that the Katcha Adatia is acting as an agent on behalf of his constituent.

5. The constituent can and must sue the third party in Bombay for the fulfilment of his contracts ; he cannot sue

his own Katcha Adatia as he is not responsible to him, once he the Katcha Adatia carries out the instructions of his constituent by entering into transactions with third parties in Bombay. As a matter of fact the Katcha Adatia is only the conduit pipe or the channel, through which he enters into transactions in the Bombay market.

6. The Katcha Adatia's remuneration consists solely of commission and he is in no way interested in the profits and losses made by his constituent on the contracts made by him on his constituents behalf.

7. It may happen that the constituent may arrange his transactions with the Bombay merchant direct. In that case the Katcha Adatia merely notes the transaction as between himself and the Bombay merchant and gets his commission.

8. As a necessary corollary of the fact that privity of contract is established between the constituent and the third parties in Bombay, as soon as the Adatia carries out his constituent's orders, an agreement merely between the constituent and the Katcha Adatia that no delivery is to be given or taken in respect of the transactions to be entered into in pursuance of the orders given by the constituent to the Adatia and that only differences would be paid in respect of the said transactions, will not vitiate the transactions as wagering and therefore void on that account, unless the common intention of both the parties to the contract viz. the constituent and the Adatia on the one hand and the third party in Bombay with whom the contracts are entered into on the other hand, is to wager and there is an agreement between all of them not to give or take delivery but only to give and pay differences in respect of the said transactions.

CHAPTER VI.

THE DEL CREDERE AGENT, THE KATCHA ADATIA AND THE PAKKA ADATIA COMPARED AND CONTRASTED.

THE Del Credere agent has been defined in Bowstead's Digest of the Law of Agency (1932) 8th Edition at p. 5 "as a mercantile agent who, in consideration of an extra remuneration, which is called a Del Credere commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts."

(a) A Del Credere agent is one, who guarantees and also makes himself personally responsible to his own principal for the performance of the contract by the other contracting party. He receives a special commission called a "commission Del Credere" as a price or premium which is paid to him by his principal for the guarantee he gives that the third party with whom he, the agent, enters into contracts for his principal will duly perform his contract. He incurs only a secondary liability towards the principal; he is in effect a surety for the persons with whom he deals to the extent of any default by insolvency or something equivalent, but not to the extent of a refusal to pay based on a substantial dispute as to the amount due. See Mulla's Contract, (1931) 6th Edition, p. 558 and *Thomas Gabriel & Sons v. Churchill & Sim*¹. His liability in regard to the guarantee must be distinguished from his liability as agent. With all that, his position is that only of an agent and he brings about contractual privity between his own principal and the other contracting party so that all the implications of the ordinary law of agency apply to him save as pointed out above.

(b) The Katcha Adatia guarantees the performance of the contract to the other contracting party with whom he enters into a contract in pursuance of the orders of his own principal, the constituent, but he does not guarantee the performance of the contract to his constituent. He establishes

1. (1914) 3 K. B. 1272 C. A.

contractual privity between his own constituent and the third party and there is no contract whatever, unless and until the Katcha Adatia enters into a contract with a third party in pursuance of his constituent's orders. The main difference between the Del Credere agent and the Katcha Adatia is that the former guarantees the performance of the contract to his own principal and not to the other contracting party, while the latter guarantees the performance of the contract not to his own principal, the constituent, but to the third party with whom he contracts pursuant to his constituent's orders. His case is the exact converse to that of the Del Credere agent. To take a concrete illustration, let us suppose that A, the constituent, orders B, his agent to enter into a contract with C the third party. Now if B, the agent is a Del Credere agent, he guarantees the performance of the contract by C to A, but not by A to C, but if B is a Katcha Adatia, he will guarantee the performance of the contract by A to C, but not by C to A.

(c) The Pakka Adatia guarantees the performance of the contract not only to his own principal, the constituent, but also to the third party, with whom, he enters into contracts, if at all, in pursuance of the orders of his principal, though he is not bound to do so. He is considered as a principal to the contract both as between himself and his own principal, the constituent, on the one hand and as between himself and the third party in Bombay on the other hand. But it must be noted that though he is considered to be a principal, he is also an agent of his principal, the constituent. He differs from both the Del Credere agent and the Katcha Adatia in that he is considered to be a principal so far as the carrying out of the transactions are concerned, while the former two, viz., the Del Credere agent and the Katcha Adatia are essentially and really agents only. The contracts on both sides as between himself and the constituent on the one hand and the third parties on the other hand are complete and no contractual privity is ever established between the constituent of the Pakka Adatia and

the third parties with whom he contracts in pursuance of his orders, if at all, and it is for this reason, viz., that he acts in the contracts as the principal both as regards his constituent and the third parties in Bombay and accepts responsibility as such, that he is paid a higher commission. In other words as Mr. Tyabji in his book on the Indian Contract Act, 1919 Edition, at page 545 in foot note 5 says, "a Pakka Adatia is a Del Credere agent and something more, a Katcha Adatia holds a position analogous to that of a Del Credere agent, but holds this position not in regard to his own principal, but to the other contracting party."

There is thus both a striking similarity and dissimilarity between (1) the Del Credere agent (2) the Katcha Adatia and (3) the Pakka Adatia and their legal positions. The similarity lies in the fact that each one of them guarantees the performance of the contract he enters into. The first guarantees it, as seen before to his own principal, the second guarantees it to the party with whom he enters into a contract pursuant to his principal's orders, but not to his own principal, while the third guarantees it both to his own principal and the third party if any, with whom, he contracts in pursuance of his principal's orders. The dissimilarity lies in the fact that the first two are really and purely agents, while the last is considered to be a principal both with regard to his own constituent and the third party in Bombay. But it must be noted that his position is that of an agent also. The Del Credere agent is in the position of a surety, the second is really an agent though he guarantees the performance of the contract, the last is employed in his own capacity to fulfil and carry out his principal's (the constituent's) orders which he may do by appropriating the contracts to himself or by entering into contracts with Bombay merchants by way of cover as he likes and is considered as a principal, but still he does not altogether give up his character of an agent.

It may be argued that "To compare the Pakka Adatia with (1) the Katcha Adatia, and (2) the Del Credere agent as has been done only accentuates the initial error as there can

be no comparison between things or persons who have nothing in common with each other, but are wholly unlike, that there is no similarity between them simply because each guarantees the performance of the contract he enters into for the reason that every contracting party guarantees the performance of the contract he enters into and that as a matter of fact the word "guarantee" is wholly inappropriate and unnecessary in the case of a person contracting on his behalf because if the party agrees to do a certain thing, he is liable to suffer the legal consequences if he fails in his performance."

It has been shown that the Del Credere, the Katcha Adatia and the Pakka Adatia are all essentially agents especially the first two, as to whose positions there is no doubt whatever, because the Del Credere agent has been held to be an agent in England in numerous cases and so also has the Katcha Adatia been held by the Privy Council to be an agent. So far as the Pakka Adatia is concerned, the relationship between his constituent and himself is also that of principal and agent for the reasons already given at length in Chapter III of book No. 1. He is treated as a principal with certain additional rights which an ordinary agent does not possess. As has been pointed out before, he is a Del Credere agent and something more with certain additional rights. Of course there is no doubt that every contracting party guarantees the performance of the contract he enters into, but generally an agent does not do so and is not personally responsible except in very special circumstances for the performance of the contract he enters into on behalf of his principal. The argument that the Pakka Adatia contracts on his own behalf is, it is submitted, misleading. He may and may not do so and as a general rule does not. The objection to the use of the word "guarantee" carries no conviction as it has been used by Jenkins C. J in the leading case of *Bhagwandas v. Kanji*¹ where the learned Chief Justice observed at p. 216 as follows: "Then again there runs through the evidence the idea that the word

1. (1905) 30 Bom. L. R. 205=7 Bom. L. R. 611.

"guarantee" is not inappropriate, though some of the witnesses under the stress of a skilful cross-examination repudiate its aptness. "Guarantee" in the strict legal sense there can be none; the absence of privity with the Bombay merchant excludes it. (See section 126 of the Contract Act). But I doubt whether there was occasion to be so shy of the word in its non-technical sense. On the other hand I do not think there was the relation of principal and agent pure and simple." The word has been repeatedly used in several later judgments. Under these circumstances if the word "guarantee" were used, it is submitted that there is nothing wrong about it. There is no doubt that the Pakka Adatia contracts so as to make himself personally responsible for the performance of the contract made by a third party and it is therefore that he is said to guarantee the performance of the contract by the third party and he is responsible whether his constituent performs the contract or not and similarly he guarantees the performance of the contract by the constituent to the Bombay merchant and he is personally responsible for the same. There is therefore nothing so radically wrong, it is submitted, in the use of the word.

CHAPTER VII.

POINTS OF DISTINCTION BETWEEN PAKKA
AND KATCHA ADATIAS.

Katcha Adatia.

1. The Katcha Adatia is merely an agent on behalf of his principal, the constituent, up-country or local.
2. The commission paid to the Katcha Adatia is lower generally four annas.
3. The name of the constituent is not communicated to the third party in Bombay, though the third party in Bombay knows and he is informed to that effect that he the Katcha Adatia is acting on behalf of an undisclosed principal viz., the constituent, up-country or local. The reason is that the Katcha Adatia acts as the principal to the third party in Bombay and is, responsible to him, while the constituent has his remedies only against the third party in Bombay.

Pakka Adatia.

1. The Pakka Adatia, though he acts as an agent to carry out his constituent's orders is considered to be a principal to him, on the one hand and to the Bombay merchant on the other hand.
2. The commission paid to the Pakka Adatia is higher, generally 8 annas.
3. The name of the constituent is not disclosed to the third party in Bombay. Nor is the constituent entitled to call upon the Pakka Adatia to disclose the name of the party with whom he enters into a contract in pursuance of an order for sale or purchase from him. The reason is that the Pakka is regarded as a principal of both the constituent and the third party in Bombay.

4. The Katcha Adatia is not entitled to substitute his own contract in fulfilment of an order from his constituent, nor is he entitled to enter into a cross contract with another constituent in fulfilment of an order from the first constituent.
5. The Katcha Adatia is merely a conduit pipe or channel through whom privity of contract is established between the constituent and the third party in Bombay.
6. The Katch Adatia guarantees the performance of the contract to the third party in Bombay but, not to his own principal, the constituent.
4. The Pakka Adatia is entitled to substitute his contract in fulfilment of an order from his constituent, so as to constitute himself the buyer or the seller, as the case may be, in respect of the said order. The Pakka Adatia is also entitled to enter into a cross contract with another constituent in fulfilment of an order from the first constituent i.e. if A, a constituent sends an order to the Pakka Adatia for sale and B, another constituent sends an order to him for purchase, the Pakka Adatia can cross the two orders of the two constituents.
5. The Pakka Adatia is a principal both to constituent and to the Bombay merchant and no privity of contract is ever established between the constituent and the third party in Bombay.
6. The Pakka Adatia guarantees the performance of the contracts both to his own principal, the constituent and to the third party in Bombay, if any.

7. In Katchi Adat, the constituent can and must sue the third party in Bombay with whom the Katcha Adatia has entered into a contract for the fulfilment of his order. The constituent cannot sue the Katcha Adatia, if the third party in Bombay does not carry out the contracts. His remedy lies only against the third party in Bombay and not against the Katcha Adatia. The Katcha Adatia is not interested in the fulfilment of the contracts save for the purpose of bringing about contractual relationship between the constituent and the third party in Bombay and for the payment of his commission.
8. An agreement between the Katcha Adatia and the constituent not to give or take delivery of the goods in fulfilment of the contracts but only to pay differences in respect of the transactions cannot vitiate the transactions as wagering and therefore void,
7. In Pakki Adat, the constituent cannot sue the third party in Bombay with whom the Pakka Adatia may have entered into a contract for the fulfilment of his order, as there is no contractual relationship between the constituent and the Bombay merchant. His remedy lies only against the Pakka Adatia. The third party in Bombay also looks and must look to the Pakka Adatia alone for the fulfilment of his contracts. The Pakka Adatia is fully interested in the contracts not only for the payment of his commission, but also for the due performance thereof both to the constituent and the third party in Bombay to whom he is responsible.
8. An agreement between the Pakka Adatia and his constituent not to give or take delivery of the goods in fulfilment of the contracts but only to pay differences in respect of the transactions vitiates the transactions as wagering and therefore void. The reason

unless there is also such an agreement between the Katcha Adatia and his constituent on the one hand and the third party in Bombay on the other hand all combined together. The reason is that unless and until the Katcha Adatia enters into a contract with a third party in Bombay in pursuance of an order from his constituent there is no contract whatever.

9. The genuineness of the contracts which the Katcha Adatia enters into with the third party in Bombay in fulfilment of the orders of his constituent is the test for deciding whether the transactions are wagering or not.

is, that the contract between the Pakka Adatia and his constituent is complete so far as it goes between themselves. The constituent is not concerned with the method or manner in which the Pakka Adatia carries out his orders, as the Pakka Adatia is responsible to him.

9. The genuineness of the contracts which the Pakka Adatia may enter into with third parties in Bombay would also be a criterion or test for deciding whether the transactions between the Pakka Adatia and his constituent are wagering or not, though they are not conclusive proof of the intention of the Pakka Adatia to wager or not to wager.

THE LAW OF TEJI-MANDI CONTRACTS.

BOOK III.

TEJI-MANDI TRANSACTIONS.

INTRODUCTORY.

BUSINESS in Teji-Mandi contracts seems to have been done in India at least for the last one century. This appears to be clear from some of the reported cases which have come up for decision before the courts and in this connection reference may be made to the Opium cases which occupied the Indian Courts of Law in the forties of the last century where the widest difference of judicial opinion existed and which subsequently went up on appeal to the Privy Council on three different occasions. A tremendous amount of speculation was carried on, on the price at which Opium, to be sold by Government at their periodical seasonal sales would fetch. These speculations were, in substance, similar in character and form and appear to have been carried on to an immense extent, and as an ordinary branch of their usual business, by most of the great banking houses in India. It was said that one million to two millions pounds sterling were at stake on the decisions of the various cases which went up to the Privy Council. It is not necessary to go into these cases at length. The curious reader would find the whole subject very elaborately dealt with in Perry's Oriental Cases (pages 175 to 243). The three cases which went up to the Privy Council are reported in Moore's Indian Appeals. They are (1)

*Ramlal Thakursidas v. Sujanmal Dhondmal*¹, (2) *Dulubdas Pitambardass v. Ramlal Thakursidas*² and (3) *Raghoonath Sahai Chotayloll v. Manekchand*³. As a result of the decisions in the Opium cases just mentioned, Act XXI of 1848 was passed in order to check gambling and for avoiding wagers. It would, however, appear that business in Teji-Mandi or Nazarana transactions was carried on as usual after the decision of these cases and the consequent enactment referred to above, but there do not seem to be any reported cases on the subject. The question whether these transactions were wagering seems to have been raised in *Harnukhrai Amulukchand v. Narotamdas Gordhandas*⁴ but Davar J who decided the suit apparently refused to express any opinion, as he thought that compared with the bulk of the plaintiffs other transactions, these were very few and rare, being not more than two or three and hence they ought not to be permitted to affect his mind as to any finding on the general character of the plaintiff's business.

It would not be incorrect to say that a certain amount of confusion of thought prevailed and still prevails as regards Teji-Mandi transactions in the Bombay market which were and are supposed to be very complicated. Complicated they certainly are to a certain extent, but not so complicated as at first sight they might appear to be. Undoubtedly until recently for the last about 40 years, there was a belief in the popular mind and also at the Bar and on the Bench and it was taken almost for granted that these transactions were pure and simple wagers and that an item in an account arising from such transactions merely arose from wagering transactions. It was believed that these transactions were purely wagering transactions because it was supposed that in actual practice no purchaser of these options ever thought of exercising his right to demand or tender delivery. Undoubtedly this was a wrong belief for the simple reason that the purchaser of the option is always entitled as a matter of

1. (1848) 4 M. I. A. 339.

2. (1850) 5 M. I. A. 109.

3. (1851) 6 M. I. A. 251.

4. (1907) 9 Bom. L. R. 125.

right to demand or take delivery as it suits him by exercising his option. The result was that in cases where these transactions occurred, the plaintiffs never sought to enforce their rights and recover their just dues because they thought though wrongly that these transactions were wagering and void and hence unenforceable. They had thus per force to bow to the inevitable. The real fact has, however, been the other way and nobody ever took the trouble to investigate their real nature. The several attempts made before Beaman J to explain their true nature and characteristics were only half hearted and that is why the learned Judge could never make up his mind one way or the other as will be clear to the reader from a perusal of the passages from the judgments cited hereafter. The English decision of the Court of Appeal¹ which was cited by Young J in the Rangoon Court in the case referred to hereafter on the option transactions negotiated on the London Stock Exchange though given about five years before was never brought to the notice of the learned Judge. The decision of Young J in the Rangoon Court² was given much later. The hesitancy of Beaman J under the circumstances is not difficult to understand. The decision of Kincaid J in *Manubhai Premchand v. Keshowji Ramdas*³ came therefore not only as a surprise but like a bolt from the blue and it was not until the decision of the court of appeal in *Manilal Dharamsi v. Allibhoy Chagla*⁴ that the law on the subject can be said to have been settled. This latter decision was subsequently reaffirmed by the court of appeal⁵ and confirmed by the Privy Council in *Sobhagnmal Gianmal v. Mukundchand Balia*⁶ and has been followed in several later cases.

1. *Buttenlandsche Bank Vereeniging v. Hildesheim* (1903) 19 T. L. R. 641.
2. *Dhunji Deosi v. Pokermall Anand roy* (1913) 24 I. C. 441.
3. (1921) 24 Bom. L. R. 60.
4. (1922) 24 Bom. L. R. 812=47 Bom. 263.
5. (1924) 26 Bom. L. R. 1097.
6. (1926) 53 I. A. 241=51 Bom. 1=28 Bom. L. R. 1388.

CHAPTER I.

TEJI-MANDI, TEJI AND MANDI TRANSACTIONS DEFINED.

MR. FAIZ B. TYABJI recently a judge of the High Court of Bombay¹ defines a Teji-Mandi transaction as "a transaction which consists of an ostensible sale by A to B of a double option of becoming either the purchaser from A, or the seller to him, of certain goods on some future date, at a price fixed at the time when the transaction is entered into." It may be added that Mr. Tyabji's definition holds good for the (1) Teji and (2) Mandi transactions as well, the only difference being that in these two latter transactions the sale by A and the purchase by B is of a single option of becoming a purchaser only in the Teji and of a seller only in the Mandi transaction. The seller of the option is technically known in the Bazar as "Khanar" (eater) and the buyer is known as the "Lagadnar" (applier). The premium paid or payable by the applier is called the "Nazrana". The sale of the option is known as Teji-Mandi Khadhi (eaten) and the purchase of the option is known as Teji-Mandi lagadi (applied). Exercising the option on or before the due date fixed for the purpose is known in technical bazar language as "saying Sahi". It is respectfully submitted that the use of the word "ostensible" is not only quite unnecessary but inaccurate as the sale of the option is not ostensible, it is real. Mr. Tyabji illustrates his definition of the Teji-Mandi transaction by the following foot-note, viz.:

"On the 1st of January B pays to A Rs. 20, and, in consideration of this payment, A agrees to sell to B the double option (viz., of becoming on the 1st of June either the purchaser or the seller of the goods) at Rs. 100. (i) On the 1st of June, if the market-rate of the goods is Rs. 120, B will decide to purchase; he will then get the goods at Rs. 100 from A and (having already paid Rs. 20 for acquiring the

1. Indian Contract Act (1919) Edition p. 158.

option) the goods will cost in all Rs. 120, he will therefore neither lose nor gain by the transaction. (ii) If, on the other hand, the market-price on 1st of June is Rs. 80, B will decide to be the seller, and A will have to purchase the goods from B paying to B Rs. 100 for them. So that B will again neither gain nor lose by the whole transaction. (iii) B will however gain, should the price be above 120, or below 80. (iv) He will lose should the price be between 81 and 119".

CHAPTER II.

THE NATURE AND *MODUS OPERANDI* OF (A) TEJI-MANDI,
(B) TEJI AND (C) MANDI TRANSACTIONS.

THE first case in which the nature and *modus operandi* of these Teji-Mandi or option transactions was explained is the case of *Jessiram Jagannath v. Tulsidas Damodhar*¹ where Beaman^{*} J described the nature and characteristics of these Teji-Manji contracts in the following terms :—"The Teji-Mandi contract in its naked simplicity is quite intelligible, "I should thus describe a simple "Teji-Mandi" contract. The party selling the double option is really doing no more than backing the stability of the market against its possible fluctuation. The party buying the double option is backing the fluctuations of the market against its stability. ...Thus the seller of a double option for a future *vaida* takes a unit such as a bale of cotton or a bar of silver or a bag of rice at the price of the day, say Rs. 100 and sells the double option at Rs. 20 per unit. This means, as I understand "Teji-Mandi," that, if by the settling day the market has either gone up or down more than ten points, the purchaser of the double option by electing to be buyer or seller according as the market has risen or fallen at due date will make profit to that extent out of the seller of the double option. If, for instance, on settling day the selling price of the unit is Rs. 88 or Rs. 112, the purchaser of the Teji-Mandi by declaring himself a seller or a buyer would make a profit of Rs. 2 per unit ; while if the market neither rises nor falls more than ten points either way, the purchaser of the Teji-Mandi is a loser to the extent of the difference. Thus in the case supposed if the market falls to 91 he declares himself a seller and loses one point for each unit ; if it rises upto 109 he declares himself a buyer at the same loss ; and so through all the intermediate stages."

1. (1912) 14 Bom. L. R. 617, 623, 624=37 Bom. 264, 272, 273.

The *modus operandi* of (1) Teji and (2) Mandi contracts i.e. single options was explained by Young J of the Rangoon Court¹. In this case the main question was whether a certain contract entered into at Rangoon relating to rice being one of a class known as Teji contracts was void as being a wager. His Lordship explained the course of dealings in these kinds of transactions in his judgment which, though not reported in an authorised report, is very important as it explains in very clear and lucid terms the real nature of these kinds of transactions :—

“ Now a Teji contract for rice as entered into in the Rangoon market seems to be as follows :—There are two parties, the one being the buyer and the other the seller, who is called the person who eats Teji (a Gujarati word meaning ‘rise’). The latter in payment of a fixed sum, small in relation to the value of the quantity of the rice dealt in, agrees to sell and deliver rice in a certain month at a certain price but not to deliver it and demand the price unless called upon to do so. It is virtually the purchase of an option or right to call for so much rice during a given month, the Teji-eater being bound to supply if called on, but the other not being bound either to demand or in default of a demand to accept delivery. If, therefore, the market price rises above the contract price it will be to the interest of the buyer to call for delivery ; If on the other hand it falls below the contract rate, it will be to his interest not to do so. As delivery may be given during the whole month, the purchaser of the option naturally waits till towards its close for fear of a sudden fall between his call for delivery and the actual delivery. It is obvious, therefore, that the transaction may be a mere bet on the rise of the market, and if the intention of both parties was not to deliver but merely to pay the difference between the Teji and the market rate on the day of settlement which in these contracts seems to have been the last day of the month, then according to the authorities it would, in my opinion,

1. *Dhunji Deosi v. Pokermall Anandroy* (1913) 24 I. C. 441, 442, 443.

be considered to be such and the contract would be void under sec. 30 of the Contract Act.

In a Mandi contract, the procedure is the same, but the parties gamble, as the defendant would say, on the chance of a fall, (Mandi being the Gujarati term for a fall). A similar fixed premium is paid to the Mandi-eater, who in consideration thereof agrees to buy rice forward from the other party at a certain fixed rate. The Mandi-eater signs a bought note, but the other party signs no sold note. If the market falls below the Mandi rate, the Mandi-eater is, as the plaintiff would say, called on to take delivery of the contract quantity and to pay more than the market price of the day. If it did not fall below that price the Mandi-eater keeps the fixed premium but does not attempt to demand delivery. Each contract, therefore, whether Teji or Mandi, is unilateral and not reciprocal—a purchase of an option in a Teji contract to buy and in a Mandi contract to sell rice at a given price in a given month. As a concise method of expressing their mutual intention, the Teji-eater signs the sold note and the Mandi-eater the bought note, implying that he is bound; and the other party, in token of his freedom from the correlative obligation to take delivery in a Teji or to give delivery in a Mandi contract, does not sign the bought note in a Teji or the sold note in a Mandi contract. This and the fact that a fixed brokerage in lieu of an ad valorem brokerage was paid at the inception of a Teji or Mandi contract seem to me the only paper differences between what has been called the ordinary and these which are alleged to be wagering contracts. All the minutia of the genuine contracts were employed either, as the plaintiff says, because it is a genuine contract, or, as the defendant says, from a desire to hoodwink the Courts and force them to collect gambling debts if the Teji or Mandi-eater repudiates. The bought or sold note used is precisely the same as that used in the ordinary contracts, the mills which in ordinary contracts it is usual to strike out from the list of those whose products the sellers may deliver, being struck out in these also."

The nature of these contracts was explained by Kincaid J in *Manubhai Premchand v. Keshavji Ramdas*¹ in the following words: "There are three common forms of speculations in Bombay. They are known respectively as (1) Teji-Mandi, (2) Teji and (3) Mandi. The word "Teji" means brightness, the word Mandi means dullness. Thus 'Teji' is used to signify a rise in the market price of goods or stock, and "Mandi" to signify a fall. (1) In the Teji-Mandi transactions, which have been very carefully examined by Beaman J in *Jessiram Juggonnath v. Tulsidas Damodar*², one party buys what is known as a double option. For this he pays a certain premium, say Rs. 20 per Rs. 1000. On the settling day the buyer has the right to declare himself either a seller or a buyer. If the market falls he will declare himself a seller. If it rises he will declare himself a buyer, e.g. if it be supposed that by the contract price a bar of silver or or a bale of goods is worth Rs. 100, A buys the double option for Rs. 20. If the goods rise to Rs. 110 he will declare himself a buyer and lose Rs. 10. If the goods fall to Rs. 90 he will declare himself a seller and will lose Rs. 10. But if the goods rise to Rs. 150 or fall to Rs. 50 he will declare himself a buyer and a seller respectively and in each case will make Rs. 30 profit. In other words to use Beaman J's phrase "the party buying the double option (the Teji-Mandi) is backing the fluctuations of the market against its stability". Conversely, the party who sells the double option backs the stability of the market against its fluctuations."

"(2) The Teji transaction is quite a different one. In it the buyer of the Teji (Lagadnaro or applier) pays the seller (Khanaro or eater) a premium or Teji over and above the contract price of the bar of silver or bale of goods. If the market rises the buyer of the Teji who is also a buyer of the silver or the goods can ask the seller of the Teji to give him the goods or their value at the market rate on settling day whatever it be. If the market falls, the buyer of the Teji

1. (1921) 24 Bom. L. R. 60, 62, 63. 2. (1912) 14 Bom. L. R. 617=37

Bom. 264.

merely loses his premium, e.g. A buys Rs. 100 worth of bar silver from B and also buys Teji by the payment of Rs. 20 premium. If the market rises to Rs. 150, A will make a profit of Rs. 50 minus his Rs. 20. If the market falls to Rs. 50, A will lose his Rs. 20 premium or Teji only. A (the buyer of the Teji) thus insures himself against a big fall. B (the seller of the Teji) is not insured against a big rise."

(3) The third kind of transaction is a 'Mandi'. It is the exact converse of the Teji. The buyer of the Mandi or premium is a seller of the goods and the Mandi is the premium which he pays against a possible rise, e.g. A sells Rs. 100 worth of bar silver to B and buys Mandi by the payment of Rs. 20 premium. If the market falls to Rs. 50 A will make a profit of Rs. 50 minus his premium. If the market rises to Rs. 150, A will lose his Rs. 20 premium or Mandi only."

The *Modus operandi* of these Teji-Mandi contracts has also been described by Mr. Billimoria the learned Judge of the Small Causes Court in *Manilal Dharamsi v. Allibhai Chagla*¹ in his referring judgment. The learned judge says :

"One party pays to the other a certain sum and thereupon with purchases from the other party an option to buy or to sell a fixed quantity of (any commodity say) camphor on the due date from or to the other party at the rate named in the contract. If the contract is a Teji one and on the due date the market rate exceeds the rate fixed in the contract, the person who has secured an option, declares that he will buy and thereupon the party who has pocketed the premium has to deliver the goods at the rate fixed or to pay the difference between the ruling market rate and the rate agreed upon in the contract.

If the contract is a Mandi contract and on the due date the market rate falls below the rate agreed upon in the contract the party who has secured the option declares that he will sell and thereupon the party who has pocketed the premium has either to take delivery of the camphor and pay

1. (1922) 24 Bom. L. R. 812, 813=47 Bom. 263, 264, 265.

for it at the agreed rate or to pay differences between the agreed rate and the ruling market rate. On the other hand in the case where the contract is for a Teji if the market rate on the due date is the same as the rate agreed upon in the contract or falls below it, the party who has secured an option, makes no declaration in which event nothing happens and he loses the premium he has already paid. So likewise if it is a Mandi contract and the due date rate is the same as the rate agreed upon in the contract or rises above it the party who has secured an option makes no declaration and in that event nothing happens and he loses the premium he has already paid.

The party who has purchased the option may in spite of the fact that the market rate on the due date has risen above or fallen below the agreed rate declare option to sell or purchase respectively if it suits his purposes to do so, with due regard to his other operations and existing circumstances, but if he does declare an option he has to abide by it and give or take delivery as the case may be or pay differences if any. x x x

In my opinion the agreements by way of Gulli or Teji-Mandi are not absolute contracts for sale and purchase at the date they are made. They become contracts of sale and purchase when the option to demand delivery or give delivery is exercised. Before the option is exercised they are agreements wherein one person for a cash consideration paid to him or promised to be paid on due date undertakes that he will place at the disposal of the other party a certain quantity of the commodity at a certain rate on the due date if such other party claims it, or undertakes to take up and pay for a certain quantity if the other party wishes to get rid of that quantity. In such contracts goods are delivered and taken delivery of and paid for at times on the option being declared to claim delivery or give delivery."

Mr. Justice N. W. Kemp also explained the nature of these Teji-Mandi transactions in *Mukundchand Balia v.*

*Sobhagmal Gianmal*¹ in which he observed "these Teji-Mandi transactions were really a bet on the rise or fall of the market above a certain figure, although I understand that by a recent decision of our Appeal Court (viz., *Manilal Dharamsi v. Allibhai Chagla*² it has been decided that they are not as a matter of course wagers. That figure is the rate at which the transaction is effected plus a sum called 'Nazarana'. If the market goes above that figure, one party must win and the other lose and if it goes below, the former must lose and the latter win. One party eats the Teji or the Mandi or the Teji-Mandi as the case may be who sells an option to buy or sell to the other ; he applies it if he buys the option." The same learned judge had occasion to examine the nature of these Teji-Mandi transactions again in *Keshrimal Anandilal v. Jaikisandas Rambilas*³ in which he observed in this connection : "Now it is necessary to ascertain exactly the nature of these transactions. Such transactions may be either Teji-Mandi which are called Nazarana or either Teji or Mandi. The latter are also Gulli transactions but the difference between them depends upon the extent of the difference between the market rate and the rate at which Teji is applied. The transactions in the suit are Teji transactions alone and the meaning of that is this that for a premium the defendant purchased on the due date the option of buying. The rate is fixed in the contract as the rate at which Teji is applied and if the market on the due date is above that rate, the defendant exercises his right of purchase at the market rate i.e., the transaction hardens automatically into a contract of purchase and then he has the right to sell to the plaintiff thereby earning a profit of the difference between the rate at which Teji was applied and the market rate on the due date. If the market rate on the due date does not reach the price at which Teji was applied, the defendant merely loses the premium he has paid. Should the defendant decide to take delivery, he can insist on doing

1. Suit No. 1379 of 1921 unreported
judgment dated 9th April 1924.
2. (1922) 24 Bom. L. R. 812=47

Bom. 263.

3. Suit No. 864 of 1929 unreported
judgment dated 31st March 1931.

so. Again before the due date, the defendant may, if he so chooses, go in the market and enter into a covering contract of sale for the due date through another broker. It is to be noted that the only loss that the person applying Teji can suffer is the amount of the premium, whilst what he may gain is the difference between the rate at which he has applied Teji and the market rate on the due date."

The nature of these Teji-Mandi contracts was also explained by Mirza J in *Narandas Sunderlal Rathii v. Jekisson-das Narandas*¹ where an attempt was made on behalf of the plaintiffs to distinguish the transactions in the suit from Cotton contracts which are governed by the Bombay Cotton Contracts Act and to which the bye-laws of the East India Cotton Association apply. It was argued that when the Teji-Mandi transactions were entered into at their inception there was and could be no contract for the sale or purchase of cotton. The learned judge agreeing with this contention explained the nature of these transactions in his judgment in the following words: "The nature of the Teji-Mandi transactions was that in consideration of the premium paid or agreed to be paid to the defendant, the defendant agreed to give to the plaintiffs the double option on the due date to declare himself either a purchaser or a seller at the rate mentioned in the Teji-Mandi. This option might never come to be exercised in which event the party paying the premium here the plaintiffs, would lose their premium. In the Teji-Mandi transactions of 1500 bales the defendant was speculating on the stability of the market at the due date and the plaintiffs were speculating on the possible fluctuations of the market. If the market did not fluctuate at all and the rate at the due date remained the same as that given in the Teji-Mandi, there would be no need to exercise either option, the plaintiffs remaining content with the loss of the premium they had paid or agreed to pay to the defendant. In case the market had fluctuated either way, on the due date of the option, the plaintiffs would find it to their

1. Suit No. 2068 of 1931 unreported judgment dated 14th September 13

advantage to declare themselves either purchasers or sellers whichever alternative might be to their advantage and hope to pocket ultimately the difference that might be in their favour between the agreed rate in the Teji-Mandi and the rate, on the Vaida day. In this way they might regain part or whole of the premium paid and if the fluctuation exceeded the limits of the premium, then they might stand also to make a profit. On the exercise of the option the resulting contract might ensue or the parties might be content to settle the transaction by means of receipt and payment of difference between the market rate and the agreed rate under the Teji-Mandi. The resulting contract if entered into would be a forward contract as from the date of the Teji-Mandi transaction to give or take delivery as the case might be on the Vaida day. The ordinary incident of a forward contract would henceforth attach to it.

Similarly in the case of the Mandi option, the defendant had purchased the option from the plaintiffs who had sold it. The defendant was speculating in respect of 500 bales on the falling tendency of the market at the due date of the exercise of the option. The plaintiffs in respect of this transaction were speculating on the upward tendency of the fluctuation in the market. If the market had remained steady or had exceeded the premium, the defendant would not ordinarily exercise his option to sell at the rate mentioned in the Mandi transaction but be content with the loss of his premium. If the fluctuations were as in this case they turn out to be, in the fall of the price of cotton on the due date of the option, the defendant would exercise his option as was done on his behalf by the plaintiffs in respect of these 500 bales at the due date of the option and that would result in a profit so as to minimise his loss in respect of the 1500 bales of Teji-Mandi. Thus the occasion for entering into the resulting contracts would not arise at the date when the Teji-Mandi and Mandi transactions were entered into but might arise on the due date for the exercise of the option."

The course of dealings in the Teji-Mandi contracts was also well explained by a witness in a recent Lahore case¹ where the contracts in the suit were nazrana contracts and it was contended that they were exactly the same as Teji-Mandi contracts dealt with in *Manilal Dharamsi v. Allibhai Chagla*². The learned judge Broadway J held that such contracts were not necessarily wagering contracts and citing with approval the passage from the witness' evidence continued :

"A man comes to me and asks for such a contract of gold for a month or two hence. We inquire the rate of nazrana current at that time. The rate usually varies from 3 annas to Rs. 2 per tola. At that rate we strike a bargain for that man with some other person. We pay the latter nazrana at the ascertained rate. He then fixes the rate. This means that he on the due date would be liable at our option either to supply or to accept the specified quantity of gold at the specified rate whatever be the market rate. The option will be with us whether to compel him to accept or to compel him to supply the gold irrespective of the market rate. We would exercise the option against that third person in accordance with our dealer's instructions."

"It would appear that what happens in a contract of this nature is that one party pays a premium to the other party thus acquiring an option to buy or to sell, as he decides, a certain quantity of gold at a certain rate on a certain date. Either on or some date prior to that date the purchaser decides whether he will buy or sell. According to his decision communicated to his broker, the broker enters into a contract with some third person in order to meet the situation. On the due date the parties can either take or give delivery of the stipulated quantity of gold or settle on the difference."

From the premises it will be seen that these Teji or Mandi or Teji-Mandi transactions are transactions merely

1. *Pirithi Singh Jamiat Rai v. Nathu* 2. (1922) 47 Bom. 263, 264 = 24 Bom. Ram A. I. R. 1932 Lah. 356. L. R. 812.

for the purchase and/or sale of options or rights at a price agreed upon between the parties at the time the contracts are first entered into for the purchase or sale of a commodity on some future date, but they are not, when first entered into, contracts for the purchase or sale of the commodity itself. The Teji transaction, it must be noted, always results in a contract for the purchase of a particular commodity, while its converse, the Mandi, always results in a contract for the sale of that commodity when the option is exercised. In the Teji-Mandi transactions (i.e., double option transactions) the applier (Lagadnar) has the right or option to declare himself a buyer or a seller, as it suits or pleases him on or before the due date fixed for the exercise of the option according to the fluctuations and position of the market in respect of that particular commodity. It may be added that the applier is always entitled to exercise his option as a matter of right when the market rate, on the last day, on which the option is exercisable, has risen above or fallen below the rate mentioned in the original contract for the purchase and sale of the option, which shall hereafter be referred to as the "Unit Price". These original transactions of the purchase and sale of the options are inchoate and incomplete in the first instance and result in complete and pakka contracts and regular transactions of purchase or sale only when the option for the purchase or sale of that commodity is exercised by the applier (Lagadnar) one way or the other on or before the last day fixed for the purpose. This is generally the last day of the month, preceding the month or months of a particular Vaida. Let us suppose that A applies Teji-Mandi or Teji or Mandi for the April-May or July-August or December Vaidas of a particular year. He is bound to exercise his option of declaring himself either a buyer or a seller in the case of the April-May Vaida on the 31st March, in the case of the July-August Vaida on the 30th June and in the case of the December Vaida on the 30th November.

Now the period of the delivery of the goods bought or sold for a certain Vaida begins from the 1st day of the

month or months of that particular Vaida, so that in the case of the April-May Vaida, it will begin from the 1st day of April, in the case of the July-August Vaida from the 1st day of July and in the case of the December Vaida, from the 1st day of December. The reason, why the option, in these Teji-Mandi or option transactions, is made exercisable by the applier a day prior to the day of the beginning of the month or months of a certain Vaida, appears to be the necessity to ascertain and determine before the commencement of the period of delivery of the goods bought and sold for a certain Vaida, whether the resulting transaction is going to be a purchase or a sale on the exercise of the option by the applier, as the eater would not and does not know till then, whether he would have to give or take delivery in respect of the said original contract of the sale and purchase of the option. In other words the option is made exercisable as aforesaid, in order to enable the parties to know, whether they have to give or take delivery of the goods, as the case may be, before the commencement of the Vaida and to facilitate the giving and taking delivery of the goods purchased or sold by the parties, during the delivery period of the Vaida. When the option is exercised they become ordinary contracts of sale or purchase to be completed or closed by a corresponding purchase or sale or to be crossed or set off against an already existing ordinary forward contract of the applier, with the eater for the same Vaida, with a view to square off the transaction of sale or purchase resulting from the exercise of the option against an ordinary forward transaction of purchase or sale so as to square off the same on or before the Vaida or the settlement day. If the applier (Lagadnar) in the Teji-Mandi contract after declaring himself a buyer or seller, as the case may be, enters into a corresponding transaction of purchase or sale or crosses it against an already subsisting ordinary forward contract of his own for the same Vaida on the very day on which he exercises his option, the transaction is squared up and closed, and the applier has only to pay or receive the

difference, if any, between the rate prevailing in the market, on the day of the exercise of the option and the amount of the premium paid or agreed to be paid by him to the Eater (Khanar) on the "unit price" and he becomes a loser to the extent of the difference between the said market rate on the day on which the option is exercised and the amount of the premium paid or agreed to be paid on the said "unit price" and conversely he becomes a gainer to the extent that the said market rate is above the amount of the premium paid or agreed to be paid on the said "unit price". If the market remains steady, without rising or falling a single point on either side of the "unit price", i. e. of the rate fixed in the transaction for the purchase of the option, the applier loses his premium altogether and the Khanar pockets the whole of the premium paid or agreed to be paid. In any event, the applier under the circumstances mentioned above can never lose and the eater (Khanar) can never gain and be entitled to more than the amount of the premium paid or agreed to be paid by him. The premium paid or agreed to be paid, is thus, the maximum amount of loss to the applier and the maximum amount of gain to the eater.

Supposing now that the applier exercises his option by declaring himself a buyer or a seller in the Teji-Mandi transaction or a purchaser in the Teji transaction or a seller in the Mandi transaction on or before the due date fixed for the exercise of the option; on the exercise of the option by the applier, the contract either of purchase or sale in the Teji-Mandi transaction or of purchase in the Teji or sale in the Mandi transaction becomes complete and the applier becomes entitled either to demand or give delivery in respect of the said contract. He may also close the contract by a corresponding contract of sale or purchase in the Teji-Mandi transaction or of sale in the Teji or purchase in the Mandi transaction, on or after the due date of the particular Vaida, for which, the transaction is entered into, and then he has to pay or receive the difference, as the case may be. In the meanwhile, until the contract of sale or purchase is closed

by a corresponding contract of purchase or sale on or after the due date, the contract remains open and the ordinary incidents of ordinary forward contracts as to payments to be made on the usual clearing dates and all other usual incidents of ordinary forward contracts apply to these contracts.

In other words, to put it briefly, what will happen if the applier decides to exercise the option he has purchased is that he may either tender or ask for delivery or he may arrange to receive the difference instead, if the market price is more or less than the "unit price."

Before the question of wager in these transactions is dealt with it, may be pointed out that the dictum of Beaman J, to the effect that the premium for the purchase of the double option is divided or rather split up into two halves on both sides of the agreed contract price or the "unit price" as is found in the illustration given by the learned judge in the passage of his judgment in *Jessiram Jagannath v. Tulsidas Damodar*¹ cited above, is entirely wrong for the premium of the double option, is not split up but remains unchanged on both sides as is quite clear from the passage in the judgment of Kincaid J in *Manubhai v. Keshowji*² cited above. To make the matters clear on this point, suppose that the "unit price" of a certain article or commodity is Rs. 100. A buys or rather applies a double option or Teji-Mandi at Rs. 20 from B on Rs. 100 the "unit price". Now, if the price of the commodity or article on the last day of the option is, say, Rs. 105, 110 and 115, A will declare himself the purchaser and lose Rs. 15, 10 and 5 respectively out of the Rs. 20 paid or to be paid by him towards the premium in respect of the purchase of the double option, and similarly if the price on the said last day is Rs. 85, 90 and 95, A will declare himself the seller and lose Rs. 15, 10 and 5 respectively out of the premium of Rs. 20 paid or payable by him as aforesaid. If the dictum of Beaman J in *Jessiram's case*¹ were correct, A would lose nothing whatever when

1. (1912) 14 Bom. L. R. 617, 623, 624 2. (1922) 24 Bom. L. R. 60.
= 37 Bom. 264.

the prices are Rs. 110 or Rs. 90 as he says in his said judgment, because the premium of Rs. 20 divided or split up half and half on both sides of the "unit price" would bring the prices to Rs. 90 and Rs. 110 respectively and there would be no loss to A whatever. But as a matter of fact that is not the case ; he loses Rs. 10 out of Rs. 20 payable by him as premium as already shown before. Similarly A would not make a profit of Rs. 5 when the prices are Rs. 115 or Rs. 85 only, nor would he make a loss of Rs. 5 when the prices are Rs. 105 and Rs. 95 ; so long as the prices do not either rise above or fall below the premium of Rs. 20 paid or payable on the "unit price", in other words, so long as the prices fluctuate between the "unit price" and the premium paid or payable on the "unit price" the applier always loses to the extent of the difference between the premium paid or payable and the market rate prevailing on the day, on which the applier exercises his option or the market rate of the last day on which, he, the applier, is bound to exercise the option, and "say Sahi" as the expression runs. So that if the market has risen above or fallen below Rs. 100, the "unit price," say Rs. 5, the buyer of the double option will lose Rs. 15 out of the premium payable by him, if Rs. 10, he will lose Rs.10, if Rs. 15, he will lose Rs. 5 and if the market has remained steady, he will lose the whole of his premium. It will thus be seen that the dictum of Beaman J is entirely wrong and misleading. With great respect to the learned judge, it is submitted he has completely failed to grasp the true nature, characteristics and peculiarities of Teji-Mandi transactions.

CHAPTER III.

LONDON STOCK EXCHANGE TRANSACTIONS.

PUT—CALL—PUT AND CALL.

It will not be out of place here to consider certain transactions prevalent on the London Stock Exchange which are known as "Options" which correspond with "Teji-Mandi" transactions known in India. These options are of three kinds (1) "put" (2) "call" and (3) "put" and "call" or "double options"; the former two viz. (1) the "put" and (2) the "call" are called single options. The "call" which corresponds with the Teji transaction in India is negotiated when A contracts to pay B money for the right to buy or not at the choice of the buyer (A) from him a named security at a given future date at a named price i.e. at the price at which it stands at the time of the making of the bargain. Thus the "call" is the right to make the party giving the option give delivery at a future date of an agreed amount of some security at a fixed price. The "call" option which in brief is an option to buy is bought by a bull i.e. a person who expects the market to rise. The "put" option which corresponds with the Mandi transaction in India is negotiated when A contracts to pay B money for the right to sell to him a named security at a given future date at a named price. In other words, the "put" is the right to make the party giving the option take delivery at a future date of an agreed amount of certain security at a fixed price. It is generally bought by a bear i.e. one who expects the market to fall. A "put" option which is in brief an option to give delivery is thus the converse of a "call" option and gives the right to sell at a given future date and at a certain price, a certain commodity, while the "call" option gives the right to buy at a given future date and at a certain price a certain commodity.

Now the two options may also be combined in what is known as the "put and call" option, that is the right either to

"put" or "call" the securities as the person who obtains the option chooses. In other words, a "put and call" or double option or the transaction (known in the United States of America as a Straddle), gives the payer of the option money the right either to sell or buy the named security at a given future date at a named price. Now in the transaction known as the "put and call" the buyer of the double option expects both a rise and fall in the market, in other words, he expects that the market will fluctuate and desiring to take advantage of both the rise and the fall and the fluctuations pays a double premium for the purchase of the option. He is, therefore, both a bull and bear. The consideration money for the purchase of the option paid on the Stock Exchange in England is called "option money" and it corresponds with the premium 'nazarana' paid in India for the purchase of the option. When the option is purchased either for the "call" or "put" or for the "put and call", the price at which the same is purchased is usually the current market price, plus the agreed amount equal to the intervening periods. The price for the purchase of the double option is generally double that of the single option.

The consideration paid for options known as option money as aforesaid, varies according to the securities dealt in and the state of the market and is a matter of arrangement between the parties. In many kinds of securities, however, the option dealings are so numerous that there are regular quotations for the put, call and put and call, the charge for the put and call being the same as that for the put alone and the call alone added together, and the charge for a call being generally the same as that for a put of the same securities. These quotations for options are, like quotations for ordinary dealings, at two prices, viz. one the price at which the dealers are prepared to give an option, the other the price at which they will take an option, the difference being "the turn of the market". Option money is not payable in advance, but becomes payable at the end of the period for which the option is given.

Messrs. Schwabe and Branson¹ give the following illustration of an option. "Suppose the market price of Randfonteins is 3. A member desiring an option gets a quotation from another member, say, for a call of 1000 shares at 3 for the end of the next account. For this he has to pay, say, $\frac{1}{4}$ th a share. If during the stipulated period the shares rise in price to more than $3\frac{1}{8}$, a sale can be effected and when the time comes they can be called at 3, and so a profit is made. If, on the other hand, the price falls, the loss is limited to the amount paid for the option, which naturally is not exercised. So with a "Put" of the same securities at the same price : if the price falls below $2\frac{7}{8}$ th the shares can be obtained at the current price, and when the time comes put at 3, while if it rises the loss is limited to the amount of the option money. With a put and call of the same shares obtained, say, for $\frac{1}{4}$ th, a profit can similarly be made if the shares either rise above $3\frac{1}{4}$ or fall below $2\frac{3}{4}$. In all these cases, if the price at the end of the period shows any profit on the option price, even though it be less than the amount paid for the option, the holder of the option would exercise it and so save a part of his option money.

As an instance of what is sometimes done, if the option deal is successful, let us take the same case, viz., a call of 1000 Randfonteins at $\frac{1}{4}$ for which 3 has been paid. Suppose the price rises to $3\frac{1}{4}$; the holder of the option sells on the market, say, 500 Randfonteins at that price, with the result that he is without any risk of loss, and certain to make a profit, if the shares keep above 3 or fall below 3. For, if the price remains above 3, he can sell the second 500, and then call the whole 1000, making his profit on second 500. Or if the price falls below 3, he can abandon his option, and buy on the market 500 at the lower price to deliver against his sale at $3\frac{1}{4}$. The amount of profit in the first case would be anything more than £1500, which he succeeded in obtaining for the sale of the second 500 ; and in the second case, the difference between £1500 and the amount paid for the 500 shares

bought in the market. If after the sale of the first 500 at $3\frac{1}{4}$, the price recedes again to $3\frac{1}{8}$, he can sell the other 500 at that price, and, when the time comes, call the whole 1000 at 3, and thus make a profit of $\frac{1}{4}$ on 500 and $\frac{1}{8}$ on the other 500, or, deducting the option price, a net profit of $\frac{1}{8}$ on 500. If the price falls below 3, say, to $2\frac{7}{8}$, he does not exercise his option at all, and so loses the $\frac{1}{8}$ option money on the 1000 shares; but he buys in the market 500 at $2\frac{7}{8}$, and delivers them to complete the sale he has made at $3\frac{1}{4}$, thus receiving a profit of $\frac{1}{2}$ on 500 shares less the $\frac{1}{8}$ option money on the 1000 or a net profit of $\frac{1}{4}$ on 500 shares. If after the sale of the first 500 at $3\frac{1}{4}$ there is a further advance in price, he calls the whole 1000, gets his option money back by delivering 500 at $3\frac{1}{4}$ and makes his profit by selling the second 500 at the advanced price. Cf. also *The Law of Gaming and Wagering* by Velinker, 1922 Ed., pp. 503-506.

The time for a giver for the "put" to declare whether he sells the security and for a giver for the call to declare whether he buys the security is fixed by r. 90 now r. 100 of the London Stock Exchange rules which says that "the time for the declaration of options is a quarter before three or on Saturdays a quarter before one O'clock. x x x
If the day for the declaration of options fall upon a day on which the stock exchange is closed, they shall be declared on the preceeding business day." The giver of money for the double option must declare whether he buys or sells by the time appointed, but in single options this is not necessary unless the price of the stock happens to be the same as that fixed as the option price, i.e. showing neither profit nor loss. In all other cases, options are said "to declare themselves" without any communications between the parties.

The nature and *modus operandi* of these option transactions have been very elaborately explained by one Mr. F. E. Armstrong in his *Book on the Stock Exchange* (1934) 2nd Edition at pp. 113 to 123. A few extracts from this excellent book to explain the nature of these transactions will be of great advantage.

“SINGLE OPTION”.

“This consists of giving or receiving money for either the “call” or the “put” of Stock or Shares at an agreed price. Like any transaction entered into by a “bull”, “bear”, or “Stag”, the ultimate aim is profit. We will assume that we are greatly impressed with the prospects of “Eldorados”, and confidently expect them to rise in price. We arrange therefore to “give” 2s. 6d. a Share for the “call” of one hundred Shares. The price at which the deal is arranged, 25s., is near the price at which they stand at present. We then have the right to become the owners of these Shares at 25s. at the date decided upon. We are not called upon to finance the Shares. All we can lose is the 2s. 6d. per Share plus expenses. What we can gain is unlimited. If the impression we have formed is correct, they may move up 2s. 6d. a share or more in one day. Between the period when we purchased our option and the date it expires they may have doubled in value. In that event we could then sell our Shares at, say, 50s., and call them, namely buy them, not at the market price, but at our original figure of 25s. This is a simple and successful option deal, and the usual practice of “declaring” the option on Declaration Day would be unnecessary. This option would “declare itself”. Where a verbal declaration is necessary is when, at the time of expiry of the option, the market price approximates to the option price which we fixed. Then it is for us to instruct our Broker to declare how we wish to act. If the price was just 25s. we should probably abandon our option. If it were 26s. then naturally we should call the Shares, and the 1s. difference we could secure by selling would be saved from the 2s. 6d. per share we had given for the option. If the price were over 27s. 9d. (that is allowing for the 2s. 6d. option money and 3d. per Share commission), then by selling we could secure a profit. If the Shares had not moved during the period, or had gone down, the option would be abandoned. No matter to what level they had descended, our liability would be only 2s. 9d. per share. We “gave” for

the "call" expecting them to advance. As our view was incorrect, we lose our option money and no more. Therein lies the advantage over an outright purchase which increases liability to the whole value of the Shares, as it is possible for them to become valueless before we can sell them and cut our loss.

Now let us assume the "put" is decided upon because we form the opinion that a Stock or Share is too high in price. The procedure is the same : we pay for the privilege or right of selling at the present existing price Stock or Shares that we expect to purchase at a lower one. It is a "bear" transaction, just as "giving for the call" was a "bull" transaction. At the end of the agreed period if our "bearish" view proves correct, we "put" or sell our Stock or Shares at the prearranged higher price and buy them back at the depreciated level. The difference in the two prices, less expenses, is our profit. If, instead of falling in price, a rise takes place our "put" option is abandoned, and our loss is limited to the amount of the option money and commission paid, no matter to what height the security has risen. Here, again, the advantage can be seen, as a "bear" position exposes one to an unlimited loss, there being no limit to the extent to which a price may rise.

These two examples are of cases where option money is "given". Option money can be "taken", as was done by the firm with whom we dealt in the two quoted instances. If we were of opinion that little move was to be expected from the shares in question which we possessed, we should have no objection to taking 2s. 6d. a Share if it were offered to us for the option to "call" them from us within three months at the price then prevailing. At least we should be certain of receiving 2s. 6d. per Share, as, whether exercised or not, the option money would be ours at the end of the period. If the Shares are "called" we have to deliver them at the option price. If the Shares are not called, the option money reduces the cost of them to us. Thus we reason as we "take" the option money offered. The view we have

when we "take" money for the "put" is that we consider the price of the Shares or Stock to be the correct value of them, and should not mind if we were called upon to buy them, at a price less by the amount of the option money than the current price. Here, again, a consideration is offered us for a view that may not eventuate. We are "bullish" and do not mind the risk, while the "giver" is "bearish" and does not mind paying for his doleful expectancy. Thus it comes about we "take" for the "put". If at the end of the period the price is lower than the option price, the Shares are "put" on us at the option price. Then we sell them and either reduce our receipts from the option money or "cut a loss". If the price is higher, we pocket the option money, and the operation would be successful from our point of view as a "taker".

In addition to the above options there is another kind of option, which, because of its greater risk and potentiality, is approximately twice as costly, namely, the

"DOUBLE OPTION".

A double option is the right either to "put" or "call" a given Stock or Share at an agreed price on a given date. This transaction has all the combined advantages of the single options we have outlined, and makes provision for both emergencies. A person who buys such an option is in a position to reap an advantage whichever way the market price moves. He, of course, has paid for this privilege, and the only problematical point at the time the double option is purchased, is whether the movements in the security in which he is interested will be of such proportions as will cover him for his expenditure. On the face of it, it looks as if a person who "gives" double option money cannot make up his mind which way the market is likely to go, and in some respects this is so. An operator may have a very decided view concerning a Stock or Share, but there may be such unsettling factors present as to make a measure of protection such as is afforded by a double option a very

valuable possession. It is the unexpected that so often happens, and here, as with a single option, whatever the movement in either or both directions, one's loss is limited to the amount which is agreed at the time the option is entered into. We may remark that, unless the price of a security at the end of the period, usually three months, is exactly the same as it was at the time the double option was bought, it is impossible to lose the whole of the option money. This is a rare contingency, although such instances have occurred. Any difference either way at the expiration of the double option can be taken advantage of, and will be so much saved from the option purchase money, even if a profit is not obtainable.

In practice some surprising fluctuations occur within the maximum period allowed for options, and shrewd "givers" make this form of operating profitable, particularly in unsettled times. It must not be overlooked that "givers" of option money can, and do, deal during the period the options are in force—selling on a sharp rise and purchasing on a fall. The possession of a double option is often a valuable protection allowing an operator to sell—knowing that he has the "call"—or purchase—knowing that he has the "put". If he can close his transaction at a profit it is usually possible to deal for settlement at the same date as the expiry of his option. This obviates contangoes or uneven positions during the unexpired period of the option, and the operator retains his option to its maturity.

Here is a case quoted in round figures for the sake of simplicity.

A "giver" pays £5 a Share for the put and call of some American Shares at £30, for three months. If these American Shares fall to £20 at any time during the three months, it is clear that, if they are bought, a net profit of £5 a Share less commission is available. If by the end of the period or at any time during the period they rise to £40, the Shares can be sold, and the same remark applies. It is, of course, necessary to deal against the option, in order to secure such profit,

a pleasant privilege not likely to be overlooked. This position may have been established, but half-way through the period of the option. There still remains the opportunity, having sold the Shares at £40, to buy them back if they slump to £20 and still have the right to "put" them at £30 at the end of option time. Or, having been bought on the set-back at £20, they can be sold on any improvement to over £30, at which price the "giver" has the "call". These figures seem Utopian, but show the utility of the double option.

For a person who "takes" double-option money the position is not quite so straight forward. Actually he can never tell until the Declaration Day how he stands. Market developments may give an indication, but the final destination of the Shares or Stock on which he has taken money is not known until the end of the option period. The people who "take" double option money are usually those who feel that they cannot go far wrong in accepting cash. That is the one certainty in the transaction for them, the destination of the cash. The disposition of the security at the end of the option period is unknown. People who own shares or Stock, the movements of which they study, are not averse to accepting what appears generous terms for the double option. Their reasoning is that they have no objection to the Shares being "called" from them as they will then be securing a considerably higher price than the present, taking into consideration the option money they receive. If the Shares are "put", then it but adds to their present holding—if they decide not to sell them—and, again allowing for the option money, they will be cheaper than ordinarily obtainable. This is the attitude of the operator who "takes" double-option money. Should the security move but little, or, having moved, it gets back to near the option price, then for him the operation has been successful, as he secures all or most of the option money as profit. If a pronounced rise takes place his shares are bought from him, but at least he has secured part of the advance in his option money. If a bad

fall occurs, he is asked to take shares at a higher price than that at which he can buy them in the market and he stands to lose unless he has anticipated the set-back and has previously sold the shares. x x x

The price charged for an option is largely dependent upon the marketability and the nature of the security, and also the current conditions which affect the particular Stock. It is obvious that an option on a Stock which seldom moves would be much cheaper than on one which fluctuates violently. It would be difficult to arrange an option in a comparatively unmarketable stock. Where contango facilities are restricted, abnormal rates are charged. Ordinarily, the "striking price," fixed for a "call" is the price at which the security is obtainable at the time plus a charge to embrace the contango. That for the "put" is the selling price plus a similar amount. For a "put" and "call" option the "striking price" is usually about the middle market price at the time the option is arranged.

Naturally, all dividends, bonuses, rights, and other advantages accruing follow the option. If a bonus or dividend is declared during the life of an option, a "giver" who called his security would call it "cum everything." If he abandons his "call" he, of course, is not entitled to such bonus or dividend.

Declaration time on the day before Contango Day is interesting and often exciting. The adjustment of the various option positions on this day is often reflected in market prices. The people who use options as a medium for their dealing, and the firms who specialize in them, can be considered shrewd and skilful judges of market developments. Often an inquiry as to why prices in a particular market are better is answered by the significant remark "option buying". Market operators only "give" money when they hold decisive views, and, therefore, while it is not an infallible test of which way a particular market is moving, this powerful factor commands attention, and leads one to admit that frequently "Options speak louder than words."

CHAPTER IV.

TEJI, MANDI AND TEJI-MANDI CONTRACTS.
DEATH, INSOLVENCY, LUNACY OR ABSENCE OF THE BUYER—
OR SELLER OF OPTION ON OR BEFORE THE DUE DATE—
BUYER'S FAILURE TO EXERCISE THE OPTION—
CONSEQUENCES.

COMPLICATED questions of law would arise in connection with the nature and modus operandi of the single or double option transactions, viz. as to what would happen if the buyer of the option fails or neglects to exercise his option or say Sahi as the expression runs, either intentionally or by accident, as for instance, in the case of his death, insolvency, lunacy or absence or for any other reason whatsoever for the matter of that, on or before the day fixed for the exercise of the option. There are three possibilities likely to happen in these single option transactions, viz. the Mandi or Teji or the double option transactions, viz. the Teji-Mandi (1) the market may remain steady, in other words, the "unit price" and the market price of the commodity in respect of which the option is to be exercised on the date fixed for the purpose may be the same (2) or the market rate may rise above "the unit price" in the Mandi or fall below it in the Teji transaction (3) or the market rate may fall below "the unit price" in the Mandi or rise above it in the Teji transaction. In the single option transactions viz., the Teji and the Mandi, in the first two eventualities, it does not matter if the applier fails to exercise his option either intentionally or by accident for the reasons just stated above. The contract in such circumstances automatically comes to an end, for the applier if he were alive and not absent, insolvent or lunatic generally does not exercise his option, though he is entitled to do so as it is of no advantage to him. And the same result, it seems, would follow if the option is not exercised by reason of the applier's death, insolvency or lunacy or absence for similar reasons. In these cases no question arises as to the result of the transaction because it automatically comes to an end and the applier loses or stands to lose the whole of the

premium paid or agreed to be paid by him. or to use the vernacular expression in this connection "Teji or Mandi Dubgai". The only question which is likely to arise in this connection is about the payment of the premium in respect thereof if it is not already paid by him to the seller of the option by the buyer. In such a case it would seem as if the seller would certainly be entitled to file a suit against the estate of the deceased or insolvent applier or to go against the estate of the lunatic applier if he is adjudged as such and a committee has been appointed in respect of his property. If the applier has not exercised the option by reason of his refractariness or absence, he is still bound to pay to the seller of the option the premium which he has agreed to pay and if he refuses to do so, the seller can certainly file a suit against him for the recovery of the amount which has been agreed to be paid by him.

In the third eventuality, the Teji transaction would automatically result in a purchase and the Mandi transaction would automatically result in a sale or to use the expression commonly used on the London Stock Exchange the "options would declare themselves". It would appear as if "the position of the applier (buyer of the Teji-Mandi or the double option) would also be similar to the one just described in the third eventuality likely to happen in the Teji or Mandi transactions, for, whether the applier exercises his option or not, he automatically becomes a buyer or seller as the case may be at the prevailing market rate at the time fixed on the last date fixed for the exercise of the option, and it does not matter whether the market rate at such time on such date has risen above or fallen below "the unit price" or coincides with it. The seller of the option would not be entitled, it seems, to close the contract of purchase or sale in the Teji or the Mandi or Teji-Mandi transaction before the last due date of the Vaida, merely by reason of the death, insolvency, lunacy, enforced absence or refractariness of the applier, as it cannot be said that there is a breach of the Teji, Mandi or Teji-Mandi transaction by reason

of his failure to exercise his option on the due date fixed for the purpose. In the circumstances just described, it would seem as if the seller of the option should, immediately on receiving information of the applier's death, insolvency, or lunacy, give notice to his legal representative if he is dead, or to the Official Assignee, if he has been adjudged an insolvent, or to the committee of the lunatic, if the buyer has been adjudged as such, informing him or them at once of the resulting purchase in the Teji or sale in the Mandi transaction or the purchase or sale as the case may be in the Teji-Mandi transaction by the applier and the market rate prevailing at the time on the last date fixed for the exercise of the option, calling upon him or them to say whether he or they desire the contract of sale or purchase to be kept open or closed by a corresponding purchase or sale on or before the Vaida day. If the applier or his legal representatives or the Official Assignee or the committee of the lunatic fails to give the necessary reply, within the time fixed in the notice which must be reasonable, it would seem that it would be the duty of the seller of the option to close the contract and not to keep it open until the last due date of the Vaida, after the expiration of the time specified in the notice at the market rate in the interests of the applier to safeguard him against the market fluctuations and hand over to him or them the balance after deduction, the amount plus the premium due to him, if it is not already paid against the estate of the deceased or against the Official Assignee or the committee of the lunatic as representing his estate. As to what is reasonable time, it should be judged by the facts of every case. It would appear, however, as if 24 hours notice at the outset would be more than enough. The seller of the option cannot take the risk of waiting any longer, for the simple reason that there may be violent fluctuations in the market and the losses under the circumstances might considerably increase, if he were to wait till the last due date of the Vaida for closing the transaction.

The next question that will have to be considered is as to what would happen if the seller of the option dies, or becomes insolvent or lunatic on or before the due date fixed for the exercise of the option by the buyer or is absent from Bombay on the day on which the option is exercisable. In this case, it would appear as if the legal representatives of the deceased seller of the option would be bound to carry out the resulting contract from the Teji, Mandi or Teji-Mandi transactions, in case the option is exercised by the buyer on or before the due date fixed for the exercise of the option and the same result would follow in case the seller becomes an insolvent or is adjudged a lunatic, in which cases, the Official Assignee or the committee of the lunatic would be bound to carry out and perform the resulting contract from the Teji, Mandi and Teji-Mandi transactions.

CHAPTER V.

THE ADVANTAGES OF TEJI-MANDI TRANSACTIONS.

HAVING grasped the nature of these Indian Teji-Mandi transactions and the option dealings prevalent on the Stock Exchange in London, the reader must have noticed that there are several advantages which result to the operator in these transactions. In the first place, the operator can enter into these transactions, in or for any commodity he likes even though he has no ready cash in hand, for they enable him to buy or sell as he likes any commodity he likes, if he expects to be in funds in a short time thereafter. This he cannot do in the ordinary forward contracts, because he will be called upon to pay margin according to the fluctuations of the market on the clearing dates, while at the same time he will have to pay cash down on the clearing dates the difference in the rates at which he bought or sold and the market rates on the clearing dates. The risk involved in ordinary forward contracts is unlimited, while in Teji-Mandi contracts the risk is entirely limited to the amount of the premium paid, which is the maximum amount he stands to lose. It will not be out of place to cite here a passage from Bewes' Stock Exchange Law and Practice (1910) Edition pp. 47, 48 in this connection where the learned author says :

"The advantages to the operator in options are several. He, anticipating a fall in the security, may give for the "put" when he could not sell a bear with the certainty of being able to take in the stock. He may be anticipating a rise and prefer paying a fixed sum for the "call" to carrying over the stock meanwhile. A genuine investor may well adopt this method when he has not his money ready to pay for a fancied security, but expects to be in funds by a future date.

The attraction to some speculators in options is that if they lose they know the extent of their loss, and if the stock

is active not only may they make an eventual profit by buying on a fallen market the stock which they have the right to "put," or by selling on a risen market the stock which they have the right to "call," but occasions may occur during the currency of the option to buy and sell several times. It is usual for the person who is to receive the option money to minimize the risk by selling or buying half the stock which he has eventually to accept or deliver, and later on he will judge by the market position whether it will suit him to sell or buy the rest of the stock before the option is declared.

Some who give money on options at once buy half the security which they have the right to "put," or sell half the security which they have the right to "call," so as to be prepared to make a little profit whichever way the market turns, so, in fact, for one sum to have what amounts to a "put and call" over half the stock.

It is not necessary to point out that the option money has to be considered and taken off any profit made by selling or buying against the option.

"Option dealing, which is not widely understood, consists of giving a sum of money to acquire the right to deal in a security at a fixed price at a definite date. The cash consideration given by an operator for this privilege is known as "option money", and the advantage of giving option money to use this method is that liability can be limited to the sum which is specifically given. This sum bears but a small ratio to the capital required to secure similar opportunities from an out-right purchase or sale, and if no opportunity for securing a profit presents itself during the period of the option, the "giver" of the option money can simply abandon his claim"¹. In other words options afford a means of speculating with limited liability, for, should the market move in the right way, a profit is made; but should it go the wrong way, all that is lost is the price paid for the option.

1. *The Book of the Stock Exchange* by F. E. Armstrong (1934) 2nd Edition p. 113.

CHAPTER VI.

TEJI-MANDI TRANSACTIONS AND WAGERING.

HAVING gone through the earlier pages, the reader will now be in a better position to understand the question of wager which arises in connection with these Teji-Mandi contracts. Are these transactions necessarily wagering from their very nature and ought they to be held as such, on that account, without any evidence or proof as to the common intention of the contracting parties or is evidence necessary to prove that these contracts were intended to be wagers as in the case of all other contracts? This was the question submitted to the High Court for answer by Mr. Billimoria the learned judge of the Small Causes Court at Bombay in his referring judgment in the case of *Manilal Dharamsey v. Allibhai Chagla*.¹ The former view mainly held by Beaman J was that they are mere wagers and must be presumed to be such from their apparent nature and characteristics alone and no further evidence or proof was necessary to show that they were wagering and not genuine contracts. This view has now been exploded and thrown overboard and it has now been definitely decided and held by the Court of Appeal² at Bombay and confirmed by the Privy Council³ and followed in later cases as will be presently seen, not only that there is no presumption that these transactions are necessarily wagers, but further that in the absence of evidence to the contrary, they ought to be treated as genuine contracts. The English Courts³ took the same view long before the earliest decision of Beaman J on the subject.

Before dealing with the several decisions on this matter it may well be pointed out at the outset that so far as the question of wager is concerned, single or double option transactions stand on an equal if not a better footing than

1. (1922) 24 Bom. L. R. 812 = 47 Bom. 263.

= 28 Bom. L. R. 1376.

2. *Mukundchand v. Sobhagmal* (1926) 51 Bom. 1 = 53 L. A. 241

3. *Buttenlandsche Bank Vereeniging v. Hildesheim* (1903) 19 T. L. R. 641.

ordinary forward contracts of purchase and sale of commodities for four reasons, viz. (1) that the buyer of the option i. e. the applier actually pays a premium for the purchase of the option to the eater as and by way of earnest, showing his intention to give or take delivery of the goods to be bought or sold by him, as the case may be, when the transaction fructuates into a contract of sale or purchase on the exercise of the option by him ; (2) secondly, the fact that the last day, on which, the option is made exercisable, is just a day prior to the commencement of the period of the delivery of the goods for a certain Vaida, is significant of the intentions of the contracting parties, as showing that they do intend to give and take actual delivery of the goods contracted for, when the transactions of purchase or sale of the goods become complete on the exercise of the option ; (3) thirdly that the premium paid or payable is paid by the applier to the eater as and by way of insurance against the fall or rise of the market below or above the contract rate or the "unit price"; in other words against the possible fluctuations of the market above or below the "unit price", and (4) fourthly and lastly that while in the forward contract of purchase or sale, the purchaser or seller, as the case may be, gains or loses the whole amount whatever it might be according as the market rises or falls and goes in his favour or against him, in other words, his gain or loss is unlimited ; in the Teji, Mandi, or Teji-Mandi contracts, he would gain the whole of the rise less the Teji or the whole of the fall less the Mandi or the whole of the rise or fall less the Teji-Mandi. Thus in the Teji, Mandi, and Teji-Mandi contracts, his loss is limited to the amount of the Teji, Mandi, or the Teji-Mandi premium paid or payable by him. His gain is, therefore, diminished only by the amount of the premium paid or payable. There is therefore, some justification for thinking that there is less risk in entering into Teji, Mandi, or Teji-Mandi transactions than in making Vaida contracts and neither could be said to be wagering, unless it is proved that the parties had agreed to settle only by payment and receipt

of differences and not to give or take delivery in any circumstances.

The propositions just set out are not without authority as will be quite clear from the following observations of Kincaid J in *Manubhai v. Keshavji*¹.

"It has thus been rightly held that speculation in forward contracts is not necessarily wagering. Now what is the difference between ordinary Vaida speculation and the Teji contract? Only this, that the Teji contract is the less speculative of the two. For he who applies Teji ensures himself by the payment of a Teji or premium from a heavy fall in the price. I am thus of opinion that Teji and Vaida transactions are on exactly the same footing and that unless it can be positively proved that the parties agreed neither to ask for nor to give delivery, the transactions are not wagering contracts".

Mr. Faiz B. Tyabji in his said work on the Indian Contract Act, after defining a Teji-Mandi transaction at p. 158 and illustrating it by a foot-note, both of which have already been cited above, concludes it (the foot note) by the observation, "that therefore the agreement is a wager, depending on the truth or falsity of A's assertion that the price will be between Rs. 81 and Rs. 119". With great respect to the learned author, it is indeed difficult to understand, what he means to convey by this remark. There is no assertion by B that the price will be between Rs. 81 and Rs. 119, much less there is or can be any falsity in it. What really happens in these transactions is simply this :—a party expects a rise or a fall in the prices of a certain commodity, on some future date from those prevailing on a certain day, and thinks that he is likely to reap some profit, if he does some business in that commodity; and instead of immediately entering into a forward contract of purchase or sale for that purpose for a certain Vaida, he merely buys an option or a right to buy or sell the commodity for that Vaida to be exercised by him, before the commencement of the period

1. (1921) 24 Bom. L. R. 60, 68.

fixed for delivery of the goods for that particular Vaida, and as and by way of earnest or genuineness of his intentions, actually pays a certain premium on a price agreed upon between the parties, at the time of entering into the contract for the purchase and sale of the option, which ultimately resolves itself into the ordinary forward contract of purchase or sale of the commodity. Delivery may or may not take place in these option contracts, as it may or may not take place in ordinary forward contracts, as the contracts may be squared or closed on or before the last due date of the Vaida or the option may not be exercised and may not harden into a contract to use the language of Kemp J. In the Teji-Mandi transaction, the applier expects both a rise and a fall in the prices and hence he buys a double option for a higher premium ; in the Teji transaction, he only expects a rise, in the Mandi only a fall, and he buys a single option for a much lesser premium. His expectations may not be realised, as the market may remain steady or may not rise or fall to the extent expected by him and in that case, he may choose, as he is quite entitled to do, to forego and lose the premium and may not exercise his option or he may buy or sell at the market rate prevailing on the last due date of the exercise of the option, expecting that he may ultimately derive profit, by the market touching the rates over and above the premium agreed to be paid by him on the "unit price," though it is quite true that he will not or may not do so, as it will be of no advantage to him if the market has not fluctuated at all (in all these three sets of transactions) or has fallen below the "unit price" in the Teji or risen above it in the Mandi transactions, in which case, the applier loses the premium paid or payable by him altogether. There does not seem to be anything in these transactions, which savours of wager per se. They do not appear to be even *prima facie* wagering, though they may undoubtedly be so and may even be proved to be so, if the common intention of the parties is to wager like any other forward contract of purchase or sale in respect of any commodity, but they cannot be

described as pure and simple wagers by their very nature without some real, substantial and tangible evidence as to the common intention of the contracting parties as has now been definitely held in several cases. If Mr Tyabji's observation cited above were correct every forward contract would be a wager depending on the truth or falsity of the assertion of the purchaser of the option that the price at the due date would not be more or less than the contract price. Another obvious test of the incorrectness of Mr Tyabji's observation is that the seller of the option is not entitled to refuse to give delivery of the goods in case the buyer demands delivery thereof on the ground that the original agreement was on the face of it a wager, and there is good authority for the proposition just set out in the judgment of Collins M. R. in the English case¹ already cited before.

In this connection the following observations are very pertinent and interesting and may be cited with advantage. "The point of all this is, that the buying of an option is one thing, and the exercise of the option is another, and neither *by itself* being in the nature of a wager, to raise the question whether Teji-Mandi transactions are wagering or not, without a clear analysis of these two things has been the cause of all the confusion in the legal mind in dealing with it. x x

The buyer of the option on the last day before the Vaida begins has to go make up his mind what he is going to do : He has bought what he hoped would prove a valuable right, but it may be that his expectations have not been fulfilled. x x

It is incorrect, therefore, to jump to the conclusion that all dealings in options are wagering ; on the contrary they are perfectly legitimate commercial transactions, *so long as* it cannot be proved that there was some agreement or understanding between the parties in something like these terms, "We agree that one of us A shall buy and the other B shall sell options, and that if A should in any case choose to exercise an option at the due date there shall always be a settlement by payment and receipt of differences." But no

1. *Buttenlandsche Bank Vereeniging v. Hildesheim* (1903) 19 T. L. R. 641.

one ever makes an agreement of this sort which can be proved, because such an agreement will never be put into writing, and if made verbally, the party who has to receive payment will invariably deny that it was made. It is permissible, however, for the Court to assume that if it is proved that the parties over a course of dealings have always settled by payment of differences, then they did so in pursuance of an agreement arrived at before the dealings commenced. But really that is most unfair on the purchaser of options. Time and again it may suit him to settle, but there is always the possibility that he may prefer to exercise the right he had paid for, and then the Judge may say, "You have settled so often before that I am entitled to hold that you did so in pursuance of an agreement to settle on every occasion."¹

The several judicial decisions which will now be referred to in their order of date will be more intelligible. The first case is the case of *Hariram v. Trikamdas*² where his Lordship observed: "While therefore I am now prepared to admit that it is open to any party suing upon a Teji-Mandi transaction to satisfy the court, if he can, that the particular instance was a genuine transaction, in which the parties did intend at the time of entering into it that delivery should be given and taken, I still think that the presumption would be strong against Teji-Mandi transactions as a class being genuine and lawful," and again in the case of *Ramchandra Shirdas v. Gangabisen Jaideo*³ the same learned Judge said: "Teji-Mandi or Nazarana transactions must be essentially wagering as they are in the nature of betting on or against the comparative stability of the market" and illustrated his proposition saying "that one party, for example, bets that the market will not rise or fall more than say Rs. 40 on a certain day. The Teji-Mandiwalla on the other hand bets that it will. If on the due date the fluctuations of the market either up or down exceed Rs. 40, the Teji-Mandiwalla wins; if not the other

1. Cf. Article in the Bombay Law Reporter Journal by Inner Temple at pp. 37-38

2. Suit No. 100 of 1908 unreported decision of Beaman J.

3. (1910) 12 Bom. L. R. 590.

party who has backed the market wins," and such being the nature of the transactions in the opinion of the learned Judge, he held that "the whole of the transactions in question in the suit were pure and unadulterated gambling." His Lordship was led to this conclusion, from the fact that they leave it open to one party to be either a buyer or seller on the due date as best suits his interests." But his Lordship seems to have changed his view in the case of *Jessiram Jagonath v. Tulsidas Damodar*¹ where His Lordship said: "In the first Teji-Mandi case I had to dispose of, I laid it down broadly that every such transaction must be a wager. In a later case a great deal of evidence was brought before me which led me to doubt whether there might not be exceptional cases in which, "Teji-Mandi" like the Liverpool double option might represent fair business dealings. I still, however, adhere generally to the view that in this country the rule ought to be that transactions shown to be "Teji-Mandi" are wagering transactions, and that the onus of proving that they are not would lie heavily indeed upon the party so alleging. Where there is a great business firm doing extensive buying and selling business in foreign markets, transactions exactly corresponding in every detail with the "Teji-Mandi" of the Bombay Bazar may no doubt quite honestly be entered into, be indeed necessary for the successful conduct of business by way of providing a certain amount of cover, but where parties, who indulge in "Teji-Mandi" exclusively or where they have small dealings of their own, which may or may not be genuine, in forward contracts and make side "Teji-Mandi" contracts not really by way of cover, but by way of hedging, it is almost certain that the latter class of contracts are in their nature essentially wagers. x x x x

"From the very nature of the transaction, from the fact of a man being utterly indifferent whether he is going to buy or sell, there must arise a strong presumption that he is not doing a genuine business and that the whole contract is really in the nature of a pure wager. I have already

1. (1912) 14 Bom. L. R. 617, 623-24=37 Bom. 264, 272, 274, 275.

pointed out that that presumption may in special cases be rebutted ; but as a rule, I think, it will be extremely difficult to do so. Where, however, the court is not concerned with the simple "Teji-Mandi" but "Teji-Mandi" "applied" to the ordinary forward contracts current, as in the present case, the true nature of the double transaction becomes more difficult to analyse and understand. I expect, however, the real explanation is that "Teji-Mandi" is not in reality applied at all to the subject-matter of a particular forward contract, but is merely entered into by way of a side contract and hedge upon a part or whole of it."

His Lordship, however, again changed his mind in the case of *Basantilal Gorakhram v. Shivnarayan Baldeodas*¹ where the learned Judge at the very beginning of his judgment remarked : "I take this opportunity of reaffirming emphatically and now virtually stripped of any qualifications whatever, the opinion that in this market "Teji-Mandi" transactions are all wagers. The more closely I look in the character and intention of these transactions, even when they are put forward as between Shroff and Shroff, the more evident it becomes that they are essentially by way of gaming and wagering. That can very easily be proved by an analysis of their contents, as for example in the extreme and very unlikely case of the market never having shifted a fraction. The result of that would be that the buyer of the option would have lost the whole of the bet to his seller and it would be a matter of indifference to him at the date of declaring himself, whether he declared himself a buyer or a seller. This shows that there can be no real genuine business, underlying dealings of this kind, whatever may be said of their counterpart, the Liverpool double options. I should for myself be disposed to hold that they too were upon a true analysis, every one of them, essentially wagering and I should expect to find them almost if not entirely confined to the operations of brokers and jobbers. I very much doubt whether any merchant doing legitimate business ever

1. Suit No. 666 of 1915 unreported judgment of Beaman J. dated 22-9-1916.

needs to have recourse to this form of buying options. I am quite sure that the class of transactions in this market called Teji-Mandi are, without exception, in intention, in essence and in fact, wagers." The learned judge held that the plaintiffs were clean out of court by the first section of the Gambling Act (Bombay Act III of 1865) as he thought it could not be denied that the defendants' contract was in furtherance of carrying out previous wagering contracts and that being so that they could not be heard in this court or any court governed by Bombay Act III of 1865 and dismissed the suit.

The fallacies in the reasoning of the learned Judge are obvious. The learned Judge starts with the presumption that these Teji-Mandi contracts are wagering and hence unlawful and comes to the conclusion that they are and must necessarily be so. It is obvious as pointed out by Shah A. C. J. in *Manilal Dharamsi v. Allibhoy Chagla*¹ that there can be no such presumption; simply because a man pays a certain sum to enable him to become a purchaser or a seller at a certain future date at a fixed price and thus provides himself with an alternative and choice, he is not thereby gambling in the legal sense of the word much less can he be convicted of it. The true test whether a contract is a wagering contract or not is whether the parties at the time it was made, did or did not agree that in any event it was to be settled only by payment of differences. The onus of proving that the contract is a wagering one always lies on the party disputing the contract to prove that it was wagering and therefore unlawful. There is no obligation on a party entering into a forward contract to make up his mind what he is going to do at the due date until that date arrives and it is not obligatory on him to prove that he intended from the first to give or take delivery. In forward contracts it has been held over and over again in innumerable cases that it is for the party setting up the defence of wager to prove that defence, but it has never been held that such contracts

1. (1922) 24 Bom. L. R. 812=37 Bom. p. 263.

are *ipso facto* wagering without adequate proof of the common intention of the contracting parties simply to give and take differences and not actual delivery. "Of course, if to buy an option is to make a bet, then there is an end of the matter, but it is obviously no more a bet than a contract to buy forward" and it is difficult to understand why a Teji-Mandi contract should be presumed to be a wager and stigmatised and held as such, while a forward contract which is as speculative a contract should be put on a different footing and should be viewed from a different angle when there is hardly any difference whatever between the two in actual practice and when these option contracts stand on even on a better footing for the reasons already pointed out before. Again the learned judge seems to base his conclusion, that they are all necessarily "without exception in intention, in essence and in fact pure wagers" from the fact, as the learned Judge seems to believe, that the applier "is utterly indifferent whether he is going to buy or sell." With great respect to the learned judge, he seems to have failed to grasp the real nature of these Teji-Mandi transactions. The applier, as has been seen, expects that the market is not going to remain steady and that there must be either a rise or a fall in the prices of a certain commodity in future. He is desirous of reaping a profit out of the fluctuations of the market. He therefore buys an option to become either a buyer or a seller of the goods on or before the last day of the option and pays a premium for that purpose, so as to enable him to take advantage of the fluctuations in the prices of that commodity, no matter whether there is a rise or a fall. To use the learned judge's own words "the party buying the double option is backing the fluctuations of the market against its stability." He is not indifferent whether he buys or sells, as the learned judge seems to think, he wants to take advantage not only of the rise, but also of any fall in the prices of that commodity, whatever suits him best, having regard to the state of the market, during the period that the option, purchased by him, is exercisable and there is nothing

illegitimate on the part of the applier in doing so, having regard to the fact that he pays or has to pay a premium, cash down for the purchase of the option, or right to do so. Nor is there anything surprising in these expectations of the applier, having regard to the common and daily experience that the market seldom remains steady and at a standstill, but frequently undergoes violent fluctuations and changes in the prices of a commodity, even in the course of a single day, nay an hour, and as transactions for a certain Vaida are entered into several months prior to the commencement of the delivery period of that Vaida, what is wrong there in purchasing an option or a right to buy or sell a certain commodity, with the absolute and inevitable certainty of becoming a regular purchaser or seller as the case may be, on some future date at a price, agreed upon at the time of the purchase and sale of the option? The answer is difficult, as perhaps there is none.

The view taken by Beaman J in the several cases cited before was disapproved by Kincaid J in the case of *Manubhai Premchand v. Keshavji Ramdas*¹ referred to above, where His Lordship after a review of all the said decisions of Beaman J said "With all deference to the eminent judge who tried the three quoted cases, I am not sure that he did not go too far in his condemnation of Teji-Mandi dealing." The case before his Lordship was that of Teji transactions only. His Lordship said: "The main ground upon which Beaman J held Teji-Mandi business to be wagering was the "utter indifference of one party whether he was going to buy or sell." That ground is absent in Teji transactions. Therein the party who applies the Teji is always a buyer."

His Lordship therefore said that the principle was clear viz. that it is necessary strictly to prove an agreement or understanding between the contracting parties that they never contemplated giving or taking any delivery, but only intended to gamble in differences. His Lordship observed at p. 68

of the report, "Behind all Vaida and Teji contracts there is a vast genuine business. Camphor or other goods may be sold and resold a thousand times before they pass from A, the importer, to Z, the distributor. But in the end they reach their destination. There is no speculation in articles that are not imported into India. It has thus been rightly held that speculation in forward contracts is not necessarily wagering. Now what is the difference between the ordinary Vaida speculation and Teji contract? Only this, that the Teji contract is the less speculative of the two. For he who applies Teji ensures himself by the payment of a Teji or premium from a heavy fall in the price. I am thus of opinion that Teji and Vaida transactions are on exactly the same footing and that unless it can be positively proved that the parties agreed neither to ask for nor to give delivery, the transactions are not wagering contracts. No such agreement has been proved here."

The actual transactions in the case before Kincaid J¹ were as follows :—"On the 6th January 1919, the plaintiff bought from the defendant 25 cases of Japanese camphor at the rate of Rs. 2-12-0 a tin, for delivery, on the 15th April 1919. On the 7th January 1919, the plaintiff paid the defendant Rs. 125, as Teji, at the rate of one anna on every Rs. 2-12-0. On the 7th February 1919, the plaintiff bought for the same delivery, one hundred cases of Japanese camphor at Rs. 2-13-0 a tin and on the 8th February paid Rs. 500, as Teji, at the rate of one anna on every Rs. 2-13-0. On the 15th February 1919, the plaintiff bought 150 cases of Japanese camphor for the same delivery at Rs. 2-15-0 a tin and on the same day, paid the defendant Rs. 750-0-0, as Teji, at the rate of one anna for every Rs. 2-15-0. Now, if the price of the camphor had fallen, no matter how little or how much, the plaintiff would have forfeited his Teji. Unfortunately for the defendant, the price of camphor rose by the settling date to Rs. 5-2-0 per tin" and the plaintiff wrote to the defendant on 14th April 1919 that he would

1. (1922) 24 Bom. L. R. 60.

take delivery on the next day. On the 15th April he went to the defendant and tendered the contract price and asked for delivery of the camphor. The defendant had no camphor to deliver and he replied to the plaintiff's letter that the plaintiff was not entitled to any delivery as the transactions were wagering and therefore invalid. The plaintiff sued the defendant claiming the difference between the rates at which he bought the camphor and its price on the settling day.

It was held that as the defendant had failed to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose, the plaintiff should not require the defendant to deliver to him any camphor, the transactions were not wagering contracts. The result of the Teji transaction as pointed out by the learned judge was that if the market fell, the buyer would not lose more than his Teji or the premium paid or payable by him.

"Therefore when the plaintiff had agreed to buy at Rs. 2-12-0, the effect of his buying Teji at one anna per tin was the same as if he had at first bought an option to purchase at Rs. 2-12-0, so that if the market fell he simply lost his one anna per tin. Could the transaction be translated into these words, "I bet you one anna per tin that the market does not fall below Rs. 2-12-0, but if it rises, you must pay me the rise, less my one anna"? Or, might it be translated in this way "if the market is steady or falls you keep my anna, if it rises I shall call for delivery at Rs. 2-12-0"? The answer would presumably depend on the evidence."¹

Mr. Velinkar² after setting out the above transactions observes : "What was then the position? Plaintiff had made a profit, being the difference between the rate of Rs. 2-12-0, Rs. 2-13-0 and Rs. 2-15-0 and Rs. 5-2-0 per tin less Rs. $125+500+700=1325$. If, however, the rate on the settling day had been Rs. 1-8-0 per tin, he would have lost Rs. 1-4-0, Rs. 1-5-0 and Rs. 1-7-0 per tin; but the effect of the

1. Cf. Article (1932) 34 Bom. L. R. 2. Cf. The Law of Gambling and Wagering (1922) 3rd Edition pp. 518-520.

Teji paid to the defendant at the rates of Rs. 2-12-0, Rs. 2-13-0 and Rs. 2-15-0 was that he would be in a position to compel the defendant to buy the comphor at those rates. He paid one anna per tin for the Teji. Deducting this, his loss would be provided for. Thus it is arguable that he has paid an anna per tin as insurance against the fall of the market below the rate at which he has agreed to buy. The other view is that the man that applies the Teji (Lagadnar) backs the contingency that the market will rise, whereas the man who "eats" the Teji (Khanar) backs the contingency that it will fall (or remain steady). For apparent rectitude the dealings are put into the form of a contract of purchase and sale. The "Lagadnar" agrees to sell and "Khanar" agrees to buy at the rate fixed, viz. Rs. 2-12-0, Rs. 2-13-0, Rs. 2-15-0 as stated above". He finally concludes with the remark that "in this view this transaction is a mere gamble in the price of a tin of camphor on the Vaida day". The answer to the remarks of Mr. Velinkar has been furnished by Kincaid J in his judgment in the said case already cited above and which is also cited by him in his book at p. 520 and it is not necessary to repeat it here.

The question whether Teji-Mandi transactions must be presumed to be merely wagers from their apparent nature and characteristics alone came up for decision before a Division Bench consisting of Shah A. C. J and Crump in *Manilal Dharamsi v. Allibhai Chagla*¹. This was a reference from the Bombay Court of Small Causes. In this case the plaintiff filed the suit to recover brokerage from the defendant for having brought about contracts of sale of camphor for certain Vaidas. Six of the contracts in question were Mandi contracts involving a turn over of over a lac of rupees, where-in the defendant in consideration of a premium received by him from the other contracting party gave the latter an option to sell to the defendant on the due date a certain quantity of camphor at a fixed rate. The other six contracts involving a turn-over of Rs. 92,000 were Teji contracts,

1. (1922) 24 Bom. L. R. 812=47 Bom. 263.

wherein the defendant in consideration of a premium received by him from the other contracting party gave the latter an option to buy from the defendant on the due date a certain quantity of camphor at a certain rate. It was pleaded in defence that the contracts, sued upon, being Teji and Mandi contracts, were by their very nature of a wagering and gambling character, and the plaintiff was not entitled to recover brokerage thereon, as he had knowingly assisted in bringing about and furthering the agreements to wager. It was proved by the plaintiff before the trial judge that in Teji and Mandi contracts actual deliveries did take place "at times" and the price agreed upon was paid and that such contracts were not gambling as a matter of course. But as it seemed to be the practice in the Small Causes Court to dismiss summarily suits on Teji and Mandi Contracts, the following question was referred to the High Court for decision, viz., "Are Teji-Mandi contracts necessarily to be held as being wagers on account of their apparent nature and characteristics alone without any other proof of the intentions of the contracting parties or is evidence necessary to prove that such contracts were intended to be wagers." Both the learned judges held that it was necessary in such contracts as in any other contracts to prove the common intention of the parties as a question of fact and that the mere fact that the contract is a Teji contract or a Mandi contract or a Teji-Mandi contract with double option makes no difference, though it may be that a party desiring to prove such contracts as wagering may be able to do so with slight proof and that it was essentially a question of fact which must be answered on the evidence in each case and the mere fact of its being a Teji-Mandi contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that the contract is void as it is in the nature of wager, has to prove that fact. Referring to the decisions of Beaman J, his Lordship the Acting Chief, Justice Shah observed :—"The practice is probably due to certain observations in *Jessiram Jagannath v. Tulsidas Damodher*¹ and

1. (1912) 14 Bom. L. R. 617=37 Bom. 264.

in the earlier case of *Ramchandra v. Gangabison*.¹ The observations in Jessiram's² case at p. 272 clearly show to my mind that it is really unsafe to lay down any general proposition in this matter ; and whatever the opinion formed by a particular court on the evidence in that particular case may be, the only general proposition which, in my opinion, can safely be enunciated is that the fact of the contract being a wager must be proved by the evidence in the case on the essential point whether the common intention of the contracting parties was to deal only in differences. It is hardly necessary to refer to any authorities on this point. Having regard to the nature of these contracts, in my opinion, it is neither possible nor desirable to lay down any general rule that they must be presumed to be wagering contracts without any proof as to the common intention of the contracting parties. There is a recent judgment of Mr. Justice Kincaid in *Manubhai v. Kesharji*³ where the same view is indicated", and Crump J observed that he did not precisely apprehend what was the point of law that was submitted for decision and after stating the question referred, continued : "Now if it is to be taken that we are asked whether as a matter of law such contracts are necessarily to be held as wagers, then the answer clearly must be in the negative. For it is not even suggested that there is any rule of evidence or any other rule of law which can be held to exclude evidence as to the true nature of such contracts. It may be that as a matter of fact it has been found in practice that a large number of these contracts are wagering contracts, but that is no ground on which a rule of law can be based. All that can be said is that there is no legal presumption that a Teji or Mandi contract is a wagering contract, and that it must be dealt with as any other contract, and that the rules that have been laid down for determining whether a contract is a wagering contract or not are applicable to this case just as much as to other contracts. The test is well known. Where

1. (1910) 12 Bom. L. R. =590.

264, 272.

2. (1912) 14 Bom. L. R. 617=37 Bom. 3. (1921) 24 Bom. L. R. 60.

it is shown that the common intention of the parties was that in no case delivery was to be taken or given, but that in all cases differences should be paid then the parties are wagering. If is impossible to my mind to go beyond that and it in effect furnishes the answer to the question propounded."

It is respectfully submitted that the decision of the Court of Appeal is perfectly correct inasmuch as the plaintiff in this suit was only a broker who had brought about two parties together. It was not the parties to the suit who were claiming for payment of differences. The original agreements between the defendant Allibhai and the party to whom he had given the option to sell and purchase were not certainly agreements for wager. The agreements would and could have been wagers if it were agreed between Allibhai and the party to whom the option was sold, that on exercising the option no delivery of the goods would ever take place, but only differences would be paid or recovered. Such was not, however, the agreement and it was also not contended that there was any such agreement at all. What was contended was that the contracts being Teji and Mandi contracts were wagering *ipso facto* and such contention was rightly overruled.

Mr. Velinkar in his said book closes his discussion of the Teji-Mandi contracts with the following remarks at p. 526, "As remarked in Reference No. 4 of 1922, the practice of the Small Causes Court in Bombay had been to summarily dismiss Teji-Mandi contracts as wagers.

The judgment of the Appeal Court will revolutionize that practice, as the defence of wagering will always be raised and the question of fact, namely, whether the intention of both parties was to take or not delivery and deal in differences only, will be in issue and must be decided on the evidence. This will necessitate a long and tedious inquiry in every case, cause delays, and encourage parties to attempt to enforce payment on gambling transactions through a court already overburdened with work which otherwise they would not have ventured to take there. However much

these undesirable results might be deplored, the law has to be administered as it stands on the Statute Book and no extraneous considerations ought to affect that paramount consideration. The remedy can be by legislation only."

It is permissible to remark that in view of the fact that the decision of the Court of Appeal referred to above was confirmed by itself in another case, viz., *Mukundchand v. Sobhagmal* on appeal¹ and approved of by the Privy Council² on appeal and followed in several later cases, the fears expressed by the learned author seem to be groundless.

*Manilal Dharamsi v. Allibhai Chagla*³ was again approved by the Appeal Court consisting of the same learned Acting Chief Justice Shah and Kincaid J in the case of *Mukundchand Balia v. Sobhagmal Gianmal*¹ where Shah A. C. J reaffirmed the principle laid down by him in the said case³ and observed, "there is no presumption as regards Teji-Mandi transactions that they are wagering transactions as pointed out by this court in *Manilal Dharamsi v. Allibhai Chagla*." An appeal was preferred to the Privy Council in the said case where it was argued before the Board that Teji-Mandi transactions were in effect the purchase of double options and really a bet on the rise or fall of the market above or below a certain figure, that figure being the rate at which the individual transactions were effected plus the nazrana, and though a previous decision of the High Court (*Manilal Dharamsi v. Allibhai Chagla*³) had ruled that a Teji-Mandi transaction is not as a matter of course a wager, the trial judge was right in holding that they were wagers in this case, as there was a presumption that dealings of this nature were wagers. Lord Warrington who delivered the judgment of the Board disallowing this contention of the appellants observed: "There is no presumption that such transactions are wagers (see *Manilal Dharamsi v. Alibhai Chagla*³) and in the absence of evidence to the contrary they should be

1. (1924) 26 Bom. L. R. 1097, 1102.

R.=51Bom. 1=53 I. A. 241.

2. *Sobhagmal Gianmal v. Mukundchand Balia* (1926) 28 Bom. L.

3. (1922) 24 Bom. L. R. 812=47 Bom. 263.

treated as genuine contracts." The decision of the Privy Council in *Sobhagmal Gianmal v. Mukundchand Balia*¹ was followed by N. W. Kemp J in *Keshrimal Anandilal a firm v. Jeikisondas Rambilas*² already referred to above where his Lordship held on the facts of the case that the transactions in question before him were not wagering as the market rate did not exceed the rate at which Teji was applied and there being obviously no occasion for the defendant to exercise his option, all that he lost was the premium paid by him and that there was no agreement between him and the plaintiffs not to give and take delivery.

The principle laid down in *Manilal Dharamsi v. Allibhai Chagla*³ by the Court of Appeal was approved through not followed on the facts of the particular case by the court consisting of Mirza and Baker JJ in the famous prosecution case known as the Sutta Gulli Kacha Khandi case, viz. *Emperior v. Thavarlal Rupchand*⁴. One of the main questions in this case was whether the Teji-Mandi business which the accused was conducting was gaming and wagering. The learned Chief Presidency Magistrate who tried the case was of opinion that the prosecution had failed to prove that the business in Teji-Mandi was gaming or wagering. The Government appealed from this decision which was heard by Mirza and Baker JJ who held on the facts of the case before them that the Teji-Mandi transactions which were entered into by the accused on behalf of one A were wagering transactions as they had no reference to any forward previous transactions which A had entered into through the accused or any other broker and that the accused knew from A's position and status in life that A was not entering into any genuine transactions to cover him against any possible loss to be incurred by fluctuations in the rates of cotton pending the date of settlement or the date of delivery, but that his object was to gamble on the rise and fall of the cotton market,

1. (1926) 28 Bom. L. R.=51 Bom. 1 =53 I. A. 241.
2. Suit No. 864 of 1929 unreported judgment dated 31-3-1931.
3. (1922) 24 Bom. L. R. 812=47 Bom. 263.
4. (1928) 31 Bom. L. R. 158=53 Bom. 367.

either to lose his deposit entirely if the market remained firm and unchanged, to make a profit if the fluctuations exceeded the margin of two for a rise and two for a fall, or to minimise his loss if the fluctuations remained within the prescribed limit." The learned judge Mirza J then referred to the decision of the Divisional Bench in *Manilal v. Allibhai*¹ and continued, "A Teji-Mandi contract, although it is of a highly speculative nature, may, under certain circumstances, be regarded as a legitimate business and may act as an insurance against the fluctuations of a constantly changing market like the market in Broach Cotton," and after referring to the decision of Beaman J in *Jessiram v. Tulsidas*² came to the conclusion as stated before.

The decision of the Privy Council in *Sobhagmal Gianmal v. Mukundchand Balia*³ was also followed by Rangnekar J in *Shivkaran Ramchandra a firm v. Kundanmal Narayandas a firm*⁴ where the usual defence that the Teji-Mandi transactions in question in the suit were wagering transactions was raised. Dealing with this defence the learned judge in his judgment observed: "The days when it was held that an inference may be raised as to the intention of the parties in regard to such transactions or that a Teji-Mandi transaction by itself on the face of it should be presumed to be a wager have long since gone by since the decision of the Privy Council in *Sobhagmal Gianmal v. Mukundchand Balia*.³ It is clear now that the law is that no such presumption arises, and that it is for the party who says that a particular Teji-Mandi transaction was intended to be a wager, to prove that case by evidence. It is undoubtedly true that the surrounding circumstances would have to be looked at in order to appreciate the evidence as to the existence of such an agreement." The learned judge then examined the evidence in the case at length and came to the conclusion on the facts of the case that no such agreement

1. (1922) 24 Bom. 812=47 Bom. 263. 3. (1926) 28 Bom. L. R. 1397=51 Bom. 1=53 I. A. 241.

2. (1912) 14 Bom. L. R. 617=37 Bom. 264.

4. Suit No. 101 of 1931 unreported judgment date 29th July 1931.

not to give or take delivery was established in this case at least on the part of the plaintiffs and decreed the suit.

The question whether these Teji-Mandi transactions were wagering was also raised before Mirza J in *Narandas Sunderlal v. Jekissondas Narandas*,¹ but the same was not argued in view of the ruling of the Appeal Court in *Manilal Dharamsi v. Allibhai Chagla*² approved by the Privy Council in *Sobhagmal Gianmal v. Mukundchand Balia*³ a view in keeping with the earlier decision of Mr. Justice Kincaid in *Manubhai v. Keshavji*⁴. The decision in *Manilal Dharamsey v. Allibhoy Chagla*² referred to above was also followed by Broadway and Munroe JJ in *Prithvi Singh Jumatrai v. Muta Ram*⁵ where the Nazrana contracts in question in the suit were treated on the same footing as Teji-Mandi contracts and were held not to be wagering. In *Dhunji Deosi v. Pokermall Anandroy*⁶ also, young J held that these Teji, Mandi and Teji-Mandi contracts are not necessarily wagering, though they may be proved to be so.

Even in England the put and call transactions were at one time supposed to be wagering and gambling. In this connection the decisions of the Court of Appeal in England which throw light on the question might be referred to. The first case is the case of *Sadd v. Foster*⁷ where the facts were as follows :—The plaintiffs who were stock brokers sued the defendant for the balance alleged to be due on the purchase of certain shares in a company, purchased and sold by the plaintiffs for and on account and at the request of the defendant, and for moneys paid for and on account of the defendant and for commission earned by the plaintiffs on account of the said transactions. The case related to what is called a “put and call option” and the question in issue was whether the plaintiffs had bought the shares in respect of which they sued on the defendant’s account or whether they

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| 1. Suit No. 2068 of 1931 unreported judgment dated 14th Sep. 1932. | Bom. 1=53 I. A. 241. |
| 2. (1922) 24 Bom. L. R. 812=47 Bom. 263. | 4. (1921) 24 Bom. L. R. 60.
5. A. I. R. (1932) Lah. 356.
6. (1912) 24 I. C. 441. |
| 3. (1926) 28 Bom. L. R. 1397=51 | 7. (1897) 13 T. L. R. 207. |

had bought them as principals. Lawrence J gave judgment for the plaintiffs and the defendant appealed. The Court of Appeal consisting of Lord Esher M. R., Lopes and Chitty LJJ dismissed that appeal confirming the decision of Lawrence J. Lord Esher M. R. observing "that he had no sympathy with either party. In his opinion this was not a true transactions. For some reason which he did not understand it had been held that such a transaction did not amount to gambling. It was an attempt to keep up the price of the shares, and in order to make it appear a true transaction it was put into the jargon of the Stock Exchange. But, as it was not necessary to decide the case, he adopted the view presented by the plaintiffs and accepted by the learned judge in the Court below, viz. that it was a modified transaction of principal and agent and that the plaintiffs had exercised the option which had been given them." It is not clear as pointed by W. A. Bewes in his book on the Stock Exchange Law and Practice¹ to what decision Lord Esher refers as there seems to be no reported English decision on the legality or otherwise of double options. "Lopes L J was of the same opinion. He thought that the plaintiffs were entitled to recover the price agreed upon between the parties. It seemed to him to be immaterial whether the transaction was treated as between principal and agent or between principals. Chitty L J delivered judgment to the same effect.

The view taken in this case was, however, subsequently discarded in a later case.² The plaintiffs in this case sued the defendant to recover the sum of £662-10-0 as the consideration of an option in certain shares granted to him. The plaintiffs' case was that in July 1902 the defendant asked the plaintiffs to buy on his behalf a call of 1000 shares of a certain Railway company, the option to be exercisable until the end of October which they did. The plaintiffs were ready and willing to deliver the shares to the defendant if he had asked for them. There was some difference between the price paid for the option to the vendors thereof and the

1. (1910) Edition at p. 50.

2. *Buttenlandsche Bank Vereeniging v. Hildesheim* (1903) 19 T.L.R.641.

price which was quoted to the defendant and that difference represented the commission charged by the plaintiffs on the transaction. The defendant denied liability on the ground that the contract made was one of gaming and wagering.

The Lower Court (Darling J) held that the contract was a gaming and wagering one, the transaction being a mere bet between the plaintiffs and the defendant and dismissed the plaintiffs' suit. The Appeal Court consisting of Collins M. R. and Mathew and Cozens Hardy L. JJ reversed the decision of Darling J, holding that it was not in its nature a gaming andwagering contract.

Collins M. R. after stating that Darling J had misapprehended the nature of the contract in question observed, "The would-be purchaser agreed to pay £662, 10sh. for the right to call for certain shares at a certain price at a given date. The evidence was that the plaintiffs, who made the bargain, actually paid £637, 10sh. to other persons for the purpose of securing this call. He agreed that if upon the evidence the true inference from all the facts was that, although the contract was in form a contract which gave the right to call for the shares, nevertheless the parties never intended that the contract should be enforced, and there was a tacit understanding hat it should not be enforced, but that differences only should be paid, the case would be different. x x x He could not agree that the bargain was in its nature a gaming and wagering one. It was a bargain for a good consideration for the right to call for certain shares. It was not a bet, nor was it a gaming contract. The consideration was paid for a real right to call for particular shares on a given date. It was like a bargain for a right to call for so many tons of iron at a certain price on a certain day." The decision just cited was given by the Court of Appeal in England in the year 1903 long before the decision of Beaman J in the case of *Hariram v. Tricumdas*¹ decided by him somewhere in the year 1908 or 1909 and there is no doubt that if the learned Judge had been referred to that case, a lot of time, trouble and money would have been saved.

1. Suit No. 100 of 1908 O. C. J.

CHAPTER VII.

PAKKA ADATIA—MARGIN—TEJI-MANDI TRANSACTIONS.

THE question as to how far the fluctuations in the rates of the commodity and Teji-Mandi or Nazrana or the premium paid or payable in respect of the Teji-Mandi transactions which the Pakka Adatia enters into under the instructions and on behalf of his constituent entitles the Pakka Adatia to demand margin from him came up for decision before Rangnekar J in a recent case¹. In this suit the plaintiff claimed to recover about Rs. 6500 out of which Rs. 4,500 and odd were alleged to be the profit in respect of Teji-Mandi transactions of 100 bales of Broach cotton of May 1st, 1929, on the footing of the difference between the selling rate of Rs. 351-4-0 and the purchase rate of Rs. 251 on March 31, 1930 and Rs. 1,900 and odd, the second item being the amount of profit on a Mandi transaction of 100 bales of Broach May cotton of 3rd May 1929, being the difference between the selling rate of Rs. 300 and the purchase rate of Rs. 261 on March 31, 1930.

The plaintiff alleged that these transactions were outstanding till February 1930 when he instructed the defendant to purchase 200 bales of Broach cotton of April May 1930 delivery at the prevailing market rate to be set off against the resulting transactions from these two outstanding Teji-Mandi and Mandi transactions, but that the defendants wrongfully closed the outstanding transactions in September and October 1929 and declined to effect the purchase and that therefore he was entitled to claim the profit which he would have made if his instructions had been carried out in February 1930.

The defendants alleged that the plaintiff failed to pay taran or margin when called upon and therefore they closed the Teji-Mandi transactions on September 18, 1929 and the Mandi transactions on October 30, 1929 and as the result of

1. *Sakarbhai Hukamchand v. Ramniklal Keshavlal* (1931) 34 Bom. L. R. 709.

the account there was a sum of Rs. 117-2-6 still due to them by the plaintiff for which they had not counterclaimed.

The learned Judge held that the outstanding transactions were closed on the dates as alleged by the defendants as they were entitled to do and that they were also entitled to refuse to enter into the purchase transactions as required by the plaintiff unless the necessary margin was paid, because there was no evidence to show that commission agents or Pakka Adatias were bound to effect a forward transaction to be set off against outstanding Teji-Mandi transactions and that the defendants who acted as the plaintiff's Pakka Adatias were under the circumstances not bound to effect the purchase transactions as required by the plaintiff as the transactions had no connection with the outstanding Teji-Mandi transactions. The learned judge relying upon the decision of the Court of Appeal in *Bhagwandas v. Kanji*¹ further held that a Pakka Adatia is entitled to demand margin before he enters into any transaction, whether an independent transactions or a transaction by way of a covering transaction.

In the first place it may most respectfully be pointed out that the authority relied on by the learned Judge for the proposition laid down by him does not lay down any proposition of the kind suggested by his Lordship as the question of the payment of margin was never raised or argued or decided either in or by the Lower Court or in or by the Court of Appeal. The learned judge seems to be under some misapprehension on this score. The first case in which it was decided that a Pakka Adatia was entitled to call for margin is the case decided by Marten C. J and Blackwell J² but it was also held there that the onus lies on the Pakka Adatia to establish that circumstances arose which justified the exercise of his powers to call for margin as laid down by the Privy Council in *Diwanchand Kirparam v. Weld & Co.*³ as it was incumbent on the agent, in this case, the

1. (1905) 30 Bom.205=7 Bom.L.R.611.

R. 147.

2. *Devshi Harpal v. Bhikamchand* 3. (1925) 28 Bom. L. R 1488 P. C.
Ramchand (1927) 29 Bom. L.

Pakka Adatia, to show that circumstances exist for the reasonable exercise of the discretion to entitle him to make a call for margin even where the contract purports to give him an absolute discretion in respect thereof.

In view of the decision of the Court of appeal just cited, (which does not appear to have been brought to the notice of his Lordship), it is difficult to understand how the defendants in this case were entitled to ask for margin and close the transactions as they did. There does not appear to be any written contract giving the defendants an absolute discretion to ask for margin as they did nor is it clear from the learned judge's judgment whether there was any other evidence led by the defendants to show the circumstances under which they alleged, they became entitled to call upon the plaintiff to pay them margin as alleged by them as they were bound to do under the said decision of the Court of Appeal just cited.¹ It would appear as if it was assumed by the parties concerned in the suit and by the learned judge as if the defendants the Pakka Adatias had an inherent right to call for margin irrespective of the fact whether the fluctuations in the market justified the Pakka Adatia's demand.

Again the plaintiffs case as made out in the plaint was that the defendants though Pakka Adatias were not entitled to close the transactions for the reason that there was no agreement to pay margin. It was not the plaintiff's case as made out in the plaint that the defendants were not entitled to close the contracts having regard to the nature or incidents of Teji-Mandi or Mandi contracts and that they could not be closed at any time and must be kept open under all circumstances irrespective of the rights or liabilities of the parties until the due date and irrespective of any fluctuations in the rates of cotton and those of premium. But at the hearing one of the arguments urged on behalf of the plaintiff was that having regard to the nature of Teji-Mandi transactions, it was not open to the commission agent to close the same at any time before the due date. The case as sought to be made

1. *Devshi Harpal v. Bhikamchand Ramchand* (1927) 29 Bom. L. R. 147.

out at the hearing was not clearly foreshadowed in the plaint and did not appear to be set up anywhere except in the counsel's opening address ; no issue was sought for by the plaintiff upon it and no opportunity was given to the defendants to call evidence to show what the usage was, nor was any question put either to the plaintiff or the defendants in their cross-examination. Dealing with the plaintiffs said contention the learned judge therefore observed that agreements like Teji-Mandi or similar agreements had certain incidents attached to them and that these incidents had been declared judicially in several cases, but that the incident insisted upon by the plaintiff had not come up for decision and that therefore before it was accepted it must be proved by evidence and would to some extent depend upon the usage of the market and though it was open to the plaintiff to put forward the incident and prove it, he had failed to do so and that therefore the defendants as the plaintiff's commission agents and Pakka Adatias were entitled to close the transactions for want of margin. Dealing with the said contentions of the plaintiff, the learned Judge observed at pp. 711-712 of the report as follows :—

“ But this case has taken more time than it should have, because it has been difficult to understand exactly the case on behalf of the plaintiff ; and there has been considerable discussion as to the nature, course and incidents attached to the Teji-Mandi business. I do not propose to enter into a detailed discussion of these questions. What a Teji-Mandi transaction is has been explained by Mr. Justice Kincaid in *Manubhai v. Keshavji*¹. It has also been explained by the earlier decisions of Mr. Justice Beaman. But the question which caused me some difficulty and which required a good deal of discussion was as to how far the fluctuations in the rates of Teji-Mandi or premium would give a right to a commission agent to demand margin money. It was argued on behalf of the plaintiff that the position of a constituent and a commission agent remains unaffected whatever the

fluctuations may be, and their respective rights can only be settled and determined on the due date. Having heard the evidence of Harakchand and Chandulal, and after hearing the learned counsel, I have come to the conclusion that the right to demand margin unless there is a specific agreement to the contrary would depend in the ordinary course not only on the fluctuations in the rates of the commodity but also in the rates of the premium. There are three courses open to a commission agent to secure the payment of the full amount of the premium. He can insist on payment of the whole premium in advance or take security for payment on the due date or he can demand margin against the fluctuations in the rates of premium. If he does not adopt either of the first two courses—and it is not surprising that many commission agents do not follow either course as it might affect business relations with their constituents, then if the constituent fails or is not able to pay the premium, on the due date, the commission agent is helpless. There is nothing on which he can lay his hands to reimburse himself against the payment of the same amount of premium which he may be called upon to pay to a broker through whom he in his turn had entered into a corresponding contract with a third party. It is for that purpose that he has a right to see what is the state of account between him and his constituent from time to time and to have regard to the fluctuations in the rates of premium. And if he finds that the transactions if closed as on a particular date for want of margin, his own liability to his broker would be reduced, then I do not see why he should not be entitled to call upon the constituent to pay sufficient margin so as to secure the payment of the whole of the moneys which may be due to him on the due date including the premium, and in default of payment to close the outstanding transaction."

With all due deference to the learned judge, his decision that the defendants as the plaintiff's Pakka Adatias were entitled to demand margin from him on account of the fluctuations in the rates of the Nazrana or premium paid or

payable by him for the reasons given by the learned Judge in the passage of his judgment just cited is not correct. With the utmost respect it is submitted that the learned judge has not correctly apprehended the real nature of these Teji-Mandi or option transactions. It is true as pointed out by the learned judge at p. 712 that the incident sought to be attached to Teji-Mandi contracts by the plaintiff had not come up for decision so far, though incidents relating to Teji-Mandi agreements had been judicially declared in several cases some of which were reported in the Law Reports. The learned Judge therefore lays it down that before such an incident can be accepted, it must be proved by evidence and that it would to some extent depend upon the usage of the market. He stopped the plaintiffs counsel from arguing the point for the reasons given by him at p. 712-713 of the report which have been already set out before. The learned judge appears to have been led to this conclusion from the fact that the commission agent or the Pakka Adatia is entitled to demand margin according to the fluctuations in the rates of premium in order to secure himself against the non-payment of the premium by reason of the constituent's failure or unwillingness or inability to pay the same on the due date, because otherwise the commission agent would be helpless as there is nothing on which he can lay his hands to reimburse himself against the payment of the same amount of premium which the commission agent might be called upon to pay to a broker through whom he in his turn had entered into a corresponding contract with a third party and it is for that purpose that he has a right to see what is the state of account between him and his constituent from time to time and to have regard to the fluctuations in the rates of premium. In the first place it is submitted that this reasoning is fallacious, as it has been laid down in several Pakki Adat cases beginning from *Bhagwandas v. Kanji*¹ that the constituent on whose behalf the Pakka Adatia acts is not in the least

1. (1905) 30 Bom. 205=7 Bom. L. R. 611.

concerned with the doings of the Pakka Adatia or the method or the manner in which he carries out his orders which is a matter solely within the discretion of the Pakka Adatia nor is the constituent entitled to claim as of right the benefit of any covering contracts entered into by the Pakka Adatia for his safety and safeguard. If the constituent has no such rights as aforesaid, it is difficult to see how he would be liable to be called upon to pay margin to safeguard the Pakka Adatia's interest on account of the fluctuations in the rates of premium. Again the learned judge says that the Pakka Adatia would not insist upon payment of the whole premium in advance or taking security for payment thereof on the due date for the reason that it would affect business relations with his constituent, but may it not be respectfully asked whether the same consequences would not follow if the Pakka Adatia demanded margin when there are fluctuations in the rates of premium? Commission agents or Pakka Adatias are very businesslike people. They would either insist upon payment of the premium in advance or ask for security for payment thereof on the due date, if the constituent is a new and fresh one, and would not do so, if the constituent is old and has had business relations established for a long time with the necessary confidence established in him.

Again the plaintiffs contention that the position of a constituent and his Pakka Adatia remains unaffected whatever the fluctuations in the rates of premium may be and that their respective rights can only be settled and determined on the due date is perfectly correct and follows as rightly contended by the plaintiff from the very nature and characteristics of a Teji-Mandi transaction and is an incident very naturally attached to it as a matter of course and as a corollary as explained in the cases that have come for decision before the courts. The Teji-Mandi contract is simple enough. A agrees that in consideration of his paying Rs. 10 to B, he shall be entitled if he so chooses, either to sell to B or to buy from B a certain commodity, say cotton, for

Rs. 100 on or at a particular Vaida. There is something in the nature of a ready contract for the sale and purchase of goods at a price fixed at the date of the contract, with this difference, that while in the latter case, the sale and purchase is of certain goods at the price fixed in the contract, in the former case, it is the sale and purchase of an option to sell or buy those goods at the rate fixed in the contract, which becomes complete on the due date, i.e., the Sahi date i.e. the date on which the option is to be exercised. The contract is complete in both cases, in the latter case delivery of the actual goods is given on payment of the price, while in the former case, there is the sale and purchase of the option or the right to call for or give delivery of the goods for which a premium is paid or agreed to be paid either in advance or before or after the due date. Now suppose that after the contract for the goods is made, the prices of the goods go either up or down, would the seller be entitled to call upon the buyer to pay margin to the extent of the difference between the contract price and the market rate? The answer must clearly and necessarily be in the negative. Similarly in the case of the sale and purchase of the option, the option is sold and bought at the premium paid or agreed to be paid or payable and thus fixed at the date of the contract and the fluctuations in the rates of premium do not and cannot matter in the least, for the rate of the premium is already fixed by the contract for the sale and purchase of the option just as the price of the goods is fixed by the contract for the sale and purchase of the goods. It is under the circumstances clear that the plaintiffs contention that the position of a constituent and his Pakka Adatia remains unaffected whatever the fluctuations in the rates of the premium may be and that their respective rights can only be settled and determined on the due date is perfectly correct and the reasons given by the learned Judge for not accepting the same are neither clear nor cogent. It will also be seen that it was not necessary for the plaintiff to lead any evidence on the incident contended for by him and prove the same as stated by the learned Judge.

In the penultimate para of his said judgment, the learned Judge observed:

"There is one point more. I do not see how the plaintiff can claim by way of damages the difference between the contract price and the price of the alleged transaction in February. According to the plaintiff the defendants contract was to keep the Teji-Mandi and Mandi transactions open till March 31, and if those transactions were wrongfully closed before the due date then the plaintiff would be entitled to damages on the footing of the difference between the contract price and the price prevailing on the due date." With all deference, the learned Judge's observations just cited appear to be correct as the option in respect of the Teji-Mandi transactions is always exercised on the due date of the option which is always fixed so that the plaintiff would not have been entitled to claim the damages on the footing claimed by him. Of course if the market fluctuates in between the date of the contract and the due date, i. e., the date fixed for the exercise of the option, the plaintiff would have been perfectly entitled to enter into other contracts either of purchase or sale by way of cover against the Teji-Mandi contracts which he had entered into and which would have become complete on the exercise of the option by him, if the Pakka Adatia through whom he had entered into the Teji-Mandi transactions was minded to do so and was prepared to carry out his instructions, otherwise he could employ some one else for the purpose to carry out his orders and reap the profit to which he is entitled when the Teji-Mandi transaction fructuates into a sale or purchase as the case may be.

CHAPTER VIII.

TEJI-MANDI CONTRACTS—BOMBAY COTTON CONTRACTS ACT
AND THE RULES MADE THEREUNDER—VOIDABILITY?

THE question whether Teji-Mandi contracts were void by reason of the fact that they contravened the rules and by-laws of the East India Cotton Association first came up for decision before N. W. Kemp J in *Keshrimal Anandilal a firm v. Jaikisondas Rambilas*¹ already cited before, where the claim was for certain brokerage in respect of certain Teji-Mandi transactions which were put through by the plaintiffs on behalf of the defendants, who besides disputing the rate of brokerage, contended that the transactions were void as being contrary to the rules and by-laws of the Association and also that they were wagering. The learned judge held that the rules and by-laws, applicable to the case before him, were those published by the Association in their publication of 1924, that Teji-Mandi transactions were not subject to the rules of the East India Cotton Association and were not therefore void. The learned Judge after setting out the defendants' contention said in his judgment :

“The next point is, whether this Teji or Gulli contract comes within the purview of the Cotton Contracts Act and by-laws of the East India Cotton Association? After setting out Ss. 2, 3 and 5 of the said Act and after stating that the by-laws applicable to the case were those published in the Association publication of 1924, the learned judge continued, “the first point to decide is whether this Teji transaction is a transaction in cotton and I have come to the conclusion that it is not, but on the due date it hardens into a contract of purchase and a contract for sale to fix the difference. I have stated what the nature of such a Teji transaction is, and it is clear that it may never harden into a contract of purchase if the market rate on the due date is less than the rate at which Teji is applied. I think it is merely a transaction which may

1. Suit No. 864 of 1929 unreported judgment dated 31st March 1931.

develop into a transaction in cotton. Unless it does, it is merely a transaction by which either the amount of premium may be lost or the difference between the market rate on the due date and the rate at which Teji was applied may be won. I therefore hold that it is not subject to the rules of the East India Cotton Association. But even if it were, there is no by-law dealing with Teji-Mandi transactions and, therefore, I do not see how such a transaction can be said to contravene the terms of any by-law of the Association. By-law 81 is relied upon. It requires a contract to be in a certain form and in writing. But the form given in the appendix is quite inapplicable to a Teji transaction. I question whether the Association would arbitrate on such a transaction."

The decision of Kemp J just cited was followed by Rangnekar J in *Shivnarayan Ramchandra a firm v. Kundanmal Narayandas a firm*¹ where the same contention was raised but was rejected by the learned judge as he felt himself bound by the decision of Kemp J. The learned judge in his judgment said, "By-law 81 required all contracts to be in writing in the form annexed to the by-laws. It is common ground that the Teji-Mandi transaction in the suit is not in writing and therefore it is argued that the transaction is void." It was held by the learned Judge following the decision of Kemp J that the Teji-Mandi transactions did not fall within the provisions of the Bombay Cotton Contracts Act and were not subject to it as a Teji-Mandi transaction is not a transaction in cotton but merely a contract of insurance capable of ripening into a transaction in cotton at a later stage."

The question came up for decision before the Court of Appeal consisting of Beaumont C. J and Rangnekar J in a recent case on appeal² from the decision of Mirza J³ where the facts were as follows :—

1. Suit No. 101 of 1931 (unreported judgment dated 29th July 1931.)

2. *Narandas Sunderlal Rathí v. Ghanashyamdas B. Dalal* (1933) 35 Bom. L. R. 640.

3. *Narandas Sunderlal Rathí v. Ghanashyamdas B. Dalal* Suit No 2068 of 1931 O. C. J unreported judgment of Mirza J dated 14th September 1932.

This was a suit to recover damages for breach of contract. The plaintiffs were Pakka Adatias and members of the East India Cotton Association of Bombay. The defendant was their constituent. The plaintiffs entered into Teji-Mandi and Mandi contracts for Broach cotton July-August 1930 delivery, with the defendant, but on the due date upon which the options became exercisable, the defendant, against whom the options had gone, refused to sign the contracts for taking or giving delivery, that is to say, he refused to carry out the terms of the original bargain. The plaintiffs closed the transactions with the result that the defendant became indebted to them in a large amount. The plaintiffs sought to set up an oral agreement to the effect that at the date when the dealings began, the defendant agreed that whenever he would enter into a Teji-Mandi or Teji or Mandi transaction, he would, on the exercise of the option by or against him on the due date, give to the plaintiffs written contracts presumably in the prescribed form in respect of the appropriate resulting forward transactions, and in support, produced contracts signed by the defendant in the firms name proved to be at the inception Teji-Mandi transactions, alleging that the contracts were so signed in pursuance of the alleged original agreement which the defendant did not deny. The plaintiffs also set up an implied agreement to the effect that the defendant being aware that the plaintiffs were members of the East India Cotton Association and were governed by its by-laws, there would have to be contracts in the prescribed form whenever the Teji-Mandi, Teji or Mandi transactions would result in forward contracts, the defendant undertaking by implication to sign such contracts.

By-law 82 of the East India Cotton Association which was by-law 81 of the rules and by-laws of the said Association in their publication of 1924 ran as follows :—"Contracts between members acting as commission agents on the one hand and their constituents on the other shall be subject to the by-laws and shall be in writing. If a constituent of any such member has agreed to sign the prescribed form of

contract but fails or refuses to do so after terms have been arranged, the contract shall be treated in all respects as if the form had been signed, and both parties shall have the rights and remedies accorded by these by-laws." The learned judge disbelieved the plaintiffs story as to the alleged express agreement and held that by-law 82 did not contemplate an implied agreement, but required an express agreement to sign the contracts and as there was no such agreement, the transaction was void. Dealing with the plaintiffs argument based upon the nature of the Teji-Mandi and Mandi transactions as entitling them to maintain the action as one for damages sustained by them upon the failure of the defendant to carry out the obligations he had entered into at the date of the transaction, his Lordship observed in his judgment¹ in this connection. "Here the plaintiffs are on the horns of a dilemma. If they were to rely upon the Teji-Mandi and Mandi transactions as meaning that the defendant agreed at the due date of the exercise of the option to pay or receive differences only, the transactions would then clearly be void as wagers. If the plaintiffs were to rely upon the Teji-Mandi and Mandi transactions as being in themselves contracts, they would as they relate to cotton be void under by-law 82 as not being in writing.

The only case which it is open to the plaintiffs to set up, is that the defendant agreed at the date of the Teji-Mandi and Mandi transactions that on the exercise of the option by or against him on the due date he would enter into the appropriate forward contracts for sale or purchase as the case might be, for that settlement. The resulting contracts would then be like any other forward contracts in cotton. For the plaintiffs to succeed therefore it must be shown that the defendant agreed to give them such forward contracts in writing on the exercise of the option on due date of the Teji-Mandi and Mandi transactions." The learned judge held that there was an implied agreement, but he took the

1. Suit No. 2068 of 1931 unreported decision of Mirza J dated 14th September 1932.

view that an implied contract would not bring the case within by-law 82 and that there must be an express agreement.

On appeal the Court of Appeal, Beaumont C. J and Rangnekar J, agreed with the learned Judge's view that no express agreement on the part of the defendant to sign the appropriate contracts was ever made. They also agreed with the learned judge that there was an implied contract, but disagreed with the view taken by him that the implied contract would not bring the case within by-law 82 and that there must be an express agreement and held that (a) by-law 82 of the East India Cotton Association did not in terms require an express contract, and an implied contract sufficed for its purpose ; (b) that inasmuch as Teji-Mandi transactions were not necessarily wagering transactions, it could be presumed that the parties impliedly agreed that the necessary contracts should be signed, that is, the contracts in the form required by the by-laws ; (c) that, therefore, there was an implied agreement between the parties at the time the contracts in suit were entered into that the requisite contracts in the requisite form should be signed ; (d) that the plaintiffs accordingly were entitled to recover, though there was no express agreement by the defendant to sign the contracts.

Dealing with the question at issue, Beaumont C. J observed at pages 642-43 of the report :

"The question then remains whether there was an implied contract. On that point the learned judge did not hold that there was no implied contract, but he took the view that an implied contract would not bring the case within by-law 82 and that there must be an express agreement. Now I am unable to accept that view of the learned Judge. The by-law does not in terms require an express contract, and I see no reason why an implied contract should not suffice. The question is whether there was any such implied contract. It seems to me that we must presume that when parties enter into a business transaction such as a Teji-Mandi contract, they intend to enter into an arrangement which will be enforceable. These parties must have intended that the

necessary contract to take or give delivery would be executed, otherwise the transaction would have been merely a wagering transaction and void, and the cases show that the presumption is that a Teji-Mandi transaction is not a mere wagering transaction. I think, therefore, we must hold that the parties impliedly agreed that the necessary contracts should be signed. As the transaction here was in cotton, I think we must further hold that the implied agreement was to sign contracts in the form required by the by-laws; otherwise again the transaction would be unenforceable. That, I think, is the natural inference to draw from the wording of the Teji-Mandi and Mandi contracts, but that inference is strengthened by the fact that there had been past dealings between the parties including Teji-Mandi transactions and the defendant always had signed the requisite contracts. That, I think, confirms our view that there was an implied agreement at the time the contracts in suit were entered into that the requisite contracts in the requisite form should be signed. Mr. Kemp for the respondent has argued that if we take the view that an implied agreement is enough for the purpose of by-law 82, the by-law becomes a farce. I rather agree, but then I am disposed to think that the by-law is really a farce directly you provide that the agreement to sign the contract may be verbal. There seems to me to be little sense in having a by-law which requires a written contract in a particular form if it goes on to provide that a verbal agreement to execute such a contract will do instead. It is, I think, plain that a verbal contract is sufficient under the latter part of by-law 82, since there is no provision that the contract is to be in writing. As a matter of fact in the previous corresponding by-law the words "in writing" were inserted, and presumably they were omitted advisedly from the new by-law. If a verbal contract is all that is necessary, I see no reason why there should not be an implied contract, and, in my opinion, the facts show that there was an implied contract."

In a recent case¹ before Kania J the question arose whether the premia paid in respect of the Teji-Mandi or double option transactions in respect of cotton could be recovered and his Lordship decided that they could. This was a suit filed by the plaintiffs to recover a sum of about Rs. 5,891 from the defendants. The plaintiffs alleged that they had acted as Pakka-Adatias of the defendants and had entered into, among others cotton transactions on their behalf. These transactions were Teji-Mandi or double option transactions, in respect of which the plaintiff had paid premia which they now claimed to recover from the defendants.

The defendants denied their liability on the ground that the option transactions were not in accordance with the by-laws of any recognised cotton association and were therefore altogether void.

In giving judgment his Lordship said that the defendants contention was that the word "contract" as defined in Section 3 sub-clause (e) of the Bombay Cotton Contracts Act IV of 1932 included options in cotton and that section 8 thereof was applicable to option transactions also. That section ran as under "Save as hereinafter provided under this Act, any contract (whether either party thereto is a member of a recognised cotton association or not) which is entered into after the date on which this Act comes into force and which is not in accordance with the by-laws of any recognised cotton association shall be void".

It was common ground that the transactions in suit had all been effected after the date on which the Act came into force and that the East India Cotton Association was a recognised association. It was also admitted that there was no provision in the by-laws framed by the East India Cotton Association in respect of option transactions. It was therefore contended by the defendants that although option transactions were contracts within the meaning of the Act, inasmuch as there were no by-laws of the East India Cotton

1. *Nathalal Bechardas v. Amritlal Nathalal & ors.* suit No. 936 of 1935 unreported judgment dated 16th July 1936.

Association in respect of these transactions, they were not in accordance with the by-laws of a recognised cotton association, and that therefore, they had succeeded in proving that the transactions in suit were void. In his Lordship's opinion the defendant's contention was incorrect. As according to the words of section 8, the burden of proving that a particular transaction on which the plaintiffs sued was void was on the defendants. It was therefore for the defendants to prove that the contracts, i. e. the option transactions were not in accordance with the by-laws of the Esst India Cotton Association. That burden could not be considered discharged merely by pointing out that there was no provision in the by-laws of the East India Cotton Association for option transactions and it could not be said that because there were no by-laws regarding option transactions therefore it was established that such transactions were not in accordance with the by-laws of a recognised association.

The defendants must in the first instance point out the by-laws and then they must show that the transactions in suit were not in accordance with those by-laws.

If the by-laws were silent on a particular point and there were no by-laws in respect of option transactions then the defendants would be unable to establish what contracts would be in accordance with the by-laws. The defendants therefore necessarily failed to show that these transactions or contracts were not in accordance with the by-laws of a recognised association. His Lordship therefore held that these transactions were valid and passed a decree in favour of the plaintiffs for Rs. 5,610-3-6 with costs.

An appeal was preferred against this judgment, but was abandoned, as it was settled before it came up for hearing before the Court of Appeal.

ADDENDUM TO CHAPTER III.

That the relationship between the constituent and the Pakka Adatia is of an equivocal kind and is a mixture of sale and agency is also borne out by a very recent decision of the court of appeal of the High Court of Lahore in *Harprashad Tulsiram v. Jindar Parshad Naim Kanwar*¹. In this case the plaintiffs who were a firm of commission agents acted as Pakka Adatias for the defendants for the purchase of gram which the plaintiffs accordingly did from third parties with their own money. The bags of gram were taken by the plaintiffs from their sellers, and put in kothas and intimation was duly sent to the defendants that their goods had been appropriated to the transaction in question. On the due date the goods were offered to the defendants but they failed to take delivery. At this, the plaintiffs sold the goods after giving due notice to the defendants and filed a suit for recovery of the balance, being the amount of loss on the resale, interest and other costs after deducting the sum of Rs. 1,500, which had been received by the plaintiffs from the defendants as advance and for the sale proceeds of the said bags. The trial Court decreed the claim, but the District Judge on appeal held that the plaintiffs had no right to sell the goods to recoup themselves as the property in the goods had not passed to the defendants and their sole remedy was to sue the defendants for damages for breach of contract calculated on the difference between the contract price and the price prevailing in the market on the due date. Though the defendants at first denied that the plaintiffs had acted as their Pakka Adatias, it was subsequently admitted by their counsel that the plaintiffs had so acted. It was conceded both on behalf of the plaintiffs and the defendants and held accordingly

1. (1933) 15 Lah. 496=A. I. R. (1934) Lah. 191=36 P. L. R. 348=150 I. C. 109.

that the correct rule of law is that where an agent, by contracting personally, had rendered himself personally liable for the price of goods bought on behalf of his principal, he has the same rights with regard to the disposal of the goods and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. It was also conceded on both sides that for determining the rights of the vendor and the purchaser in this behalf, reference must be made to sec. 107 of the Indian Contract Act, IX of 1872 as it stood before the enactment of the Indian Sale of goods Act, 1930 and that under that section an unpaid vendor could not sell the goods until the property in them had passed to the purchaser ; but as in the present case the plaintiffs had appropriated specific goods to the defendants and earmarked them for the transaction in dispute and had also communicated the same to the defendants, it was held that the property in the goods had passed to the defendants and the plaintiffs had a right of re-sale. It is submitted that this decision is perfectly correct. It shows the dual character of the Pakka Adatia and the relationship between him and his constituent.

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